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In The Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a city council engage in viewpoint discrimination under the Free Speech and Free Exercise Clauses when it promulgates and enforces a "non-denominational" prayer policy specifically to prevent a city council member from closing a council meeting opening prayer in the name of Jesus Christ, but permits prayer by other council members referring to other deities?

2. Does prayer offered by an individual city council member at the opening of a council meeting constitute "government speech"?

3. Is a policy permitting only "non-denominational" prayers at city council meetings unconstitutionally vague and overbroad?

4. Does a city council policy that proscribes (and prescribes) the content of prayers offered at council meetings violate the Establishment Clause?

PARTIES TO THE PROCEEDING

Petitioner Hashmel C. Turner, Jr., a member of the City Council of the City of Fredericksburg, Virginia, was the plaintiff-appellant in the Court of Appeals.

The respondent City Council of the City of Fredericksburg, Virginia, and Thomas J. Tomzak, in his official capacity as Mayor of the City of Fredericksburg, Virginia, were the defendants-appellees in the Court of Appeals.

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In a decision that has already triggered a discriminatory backlash against state-trooper chaplains in Virginia and that threatens to undermine free speech rights around the country, the Court of Appeals below ruled that the individually-composed prayer offered by Hashmel C. Turner, Jr., to open a city council meeting is "government speech." This ruling, which

theoretically could permit a city council to prepare the text of an approved prayer and require any council members who wish to pray to read from the approved script, is unprecedented in the history of this Court's First Amendment jurisprudence. It violates this Court's outright prohibition on the government prescribing or proscribing the content of any prayer. It gives government unbridled authority to discriminate against religious viewpoints under the "government speech" umbrella without any accountability. It ignores the fundamental elements of the government speech doctrine. And it comes against the backdrop of the Fredericksburg City Council's targeted adoption and enforcement of a "non-denominational" prayer policy specifically designed to prevent Councilor Turner from closing a council meeting opening prayer in the name of Jesus Christ, while at the same time permitting prayer by other council members referring to other deities.

The Court of Appeals ruling not only presents important and novel questions of Federal law that should be addressed by this Court, it refashions the legislative prayer doctrine announced in Marsh v. Chambers, 463 U.S. 783 (1983). Instead of making the threshold determination that Councilor Turner's prayer was intended to proselytize or exploit one religion over another, the Court of Appeals approved a governmental policy aimed directly at prescribing the content of specific prayers, stating that government can make prayer "more accessible" to persons from "a variety of backgrounds" in a manner "designed to include members of the community." But Lee v. Weisman, 505 U.S. 577, 588 (1992), made clear that government cannot actively seek to impose

civil religion on *anyone*: "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." In the quarter-century since the Marsh decision, government has never been permitted to prescribe or parse the content of individually prepared and spoken prayers and it should not be permitted to do so now when settled principles of First Amendment law forbid it.

This Court should grant review and rescue its free speech and religion clause jurisprudence from the far-reaching discriminatory implications of the decision below.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Fourth Circuit appears in the Appendix at A-1 through A-10 and is reported at 534 F.3d 352 (4th Cir. 2008). The opinion of the United States District Court for the Eastern District of Virginia appears in the Appendix at A-11 through A-23 and is not reported, but may be found at 2006 WL 2375715 (E.D. Va. 2006).

JURISDICTION

The Fourth Circuit issued its opinion and order on July 23, 2008. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1). The district court's jurisdiction over this suit, which included claims for declaratory relief and involved the constitutionality of the City's policy, arose under 42

U.S.C. § 1983, 28 U.S.C. § 1343, 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-02.

CONSTITUTIONAL PROVISIONS AND POLICY

U.S. Const. Amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

Relevant portions of the transcript of the meeting at which the City Council discussed and voted upon the prayer policy, and the text of the memorandum prepared by the Fredericksburg City Attorney proposing the prayer policy, are set forth in the Appendix at A-24 through A-34.

STATEMENT OF THE CASE

Since at least 1957, the Fredericksburg City Council has opened its council meetings with prayer. These prayers are presented by a member of City Council on a rotating basis – in other words, members take turns presenting the prayers, with a different Council member praying at each meeting.

Upon his initial election to City Council in 2002,[1] Councilor Turner (who is a full-time employee of Fort A.P. Hill, an ordained minister and a part-time pastor of the First Baptist Church of Love, a

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[1] In 2006, Turner was elected to another four year term.

nondenominational church in the Fredericksburg area) took his place in this prayer rotation. From 2002 through 2005, of the approximately 100 prayers presented by various City Council members, Councilor Turner offered less than ten. In nearly all of those prayers, Councilor Turner closed by praying in the name of Jesus Christ because he sincerely believes that he is required to do so by his faith. During that period, no other City Council member ever mentioned the name of Jesus Christ in any of the approximately 90 additional prayers presented.

While no other City Council member mentioned the name of Jesus Christ in a prayer since 2002, other Councilors during this time period used varying names for the deity they invoked: On sixteen (16) different occasions, one particular Councilor prayed to "Almighty God." On fifty-nine (59) different occasions, Councilors (other than Councilor Turner) referred to either "Father" or "Heavenly Father."[2] These "denominational" practices have not stopped since November 8, 2005,

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[2] The deities referenced by council members in their prayers are also seen to intervene in human affairs (as opposed to Deistic or other Gods who do not, or no God at all). Prayers by other council members have been made before Christmas "in the spirit of the season" (Fourth Circuit App., p. 551) and included entreaties for the "gift of forgiveness" and the "gift of redemption." Id. They have included "special prayer" for healing and comfort for specific people. (Fourth Circuit App., p. 553). Some plead for a "spirit of wisdom, charity and justice," while others pray for intervention on behalf of people in uniform, or help in making decisions. (Fourth Circuit App., pp. 551-52). These prayers, made in the name of a merciful Father or Almighty God, are no less denominational than Councilor Turner's prayers, if indeed his may be deemed denominational at all.

the date when City Council adopted the new policy that resulted in Councilor Turner being excluded from the prayer rotation.

On November 8, 2005, in response to threatened litigation by the ACLU, the City Council adopted a policy of offering only "nondenominational" prayers. (App., pp. A-24 – A-30 (relevant excerpts of transcript of Nov. 8, 2005 meeting)). This policy was discussed and adopted by the City Council members upon the advice and recommendation of the City Attorney, who prepared a memorandum setting forth her findings and conclusions. (App., pp. A-31 – A-34).

The City Attorney's memorandum, in pertinent part, set forth the following conclusion and recommendation:

> Council may continue to offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work on the City, as part of its official meeting. At this time, there is no clear legal authority to permit a denominational prayer—one invoking Jesus Christ, for example—as part of the official meeting.

Id.

In the discussion at the November 8, 2005 meeting, the City Council voted upon a motion to "accept the City Attorney's recommendation that Council continue to offer nondenominational prayers

seeking God's blessing on the governing body and his assistance in governing works of the city as a part of its official meeting." (App., p. A-27). The motion was adopted by a vote of 5-1, with Councilor Turner abstaining. (App., p. A-29).

Councilor Turner's next turn in the rotation to pray arrived on November 22, 2005. Before the meeting, the Mayor of Fredericksburg asked Councilor Turner if he would continue to invoke the name of Jesus Christ in his prayers. Councilor Turner stated that he would. Thus, at the November 22, 2005 City Council meeting the Mayor, who presided at City Council meetings, refused to recognize Councilor Turner and instead recognized Councilor Girvan for the opening prayer.[3]

Turner filed this suit on January 11, 2006, in the United States District Court for the Eastern District of Virginia, Richmond Division, asserting

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[3] After the vote, Mayor Tomzak told the Richmond Times-Dispatch that, "I thought we had violated [Turner's] First Amendment rights. He was only praying for the good health of his community." (Fourth Circuit App., pp. 574-75 ("Fredericksburg Council Sued by Councilman," The Richmond Times-Dispatch, Jan. 12, 2006)). Mayor Tomzak was quoted in Fredericksburg's The Free Lance-Star newspaper as follows: (i) ". . . The suit filed today is 'a lawsuit that I probably agree with'"; (ii) Councilor Turner is a "man of faith and a man of principle"; and (iii) he refused to recognize Councilor Turner for prayer at the November 22, 2005 Meeting because "I did not want to unleash a 1,000 pound gorilla – the ACLU – on the City Council." (Fourth Circuit App., pp. 572-73 ("Councilman Sues Fellow Council Members," The Free Lance-Star, Jan. 11, 2006)).

claims under 42 U.S.C. § 1983 for violations of his rights under the First, Fifth and Fourteenth Amendments to the Constitution, as well as certain provisions of the Virginia Constitution, and seeking declaratory and injunctive relief. After exchanging discovery responses, the parties cross-moved for summary judgment. Turner argued, *inter alia*, that the City Council's policy and subsequent action barring him from the prayer rotation constituted viewpoint discrimination. He also argued that the policy itself was unconstitutionally vague and overbroad. He argued that it violated the Establishment Clause because it constituted an improper prescription or proscription of official prayer. And he argued that it violated his right to the free exercise of his religion.

The defendants argued, *inter alia*, that because legislative prayer is government speech, Turner had no free speech rights to protect. In addition, they argued that the policy did not violate the Establishment Clause because it was within the discretion afforded City Council to avoid running afoul of Establishment Clause concerns.

Turner responded by contending that legislative prayer was not government speech and was either private speech or, at the most, "hybrid speech," a category of mixed speech recognized by some judges in the Fourth Circuit that still provided protection from viewpoint discrimination. The district court granted the defendants' motion for summary judgment and denied Turner's motion for summary judgment, finding Turner's prayer to be

unprotected "goverment speech." It also found no violation of the Establishment Clause.

On appeal, the Fourth Circuit panel applied the four-part test adopted by the Fourth Circuit in Sons of Confederate Veterans v. Comm'r of Dep't of Motor Vehicles, 288 F.3d 610 (2002), to determine that legislative prayer was unprotected "government speech." (App., pp. A-4 – A-6). In assessing Turner's claims under the Establishment Clause, and specifically the basic rule under Lee v. Weisman prohibiting the state from prescribing or proscribing the content of official prayer, the panel determined that Weisman's rule did not control because that case focused on whether the state could compel students to participate in a religious exercise as part of a school program. (App., pp. A-7 – A-8). The panel indicated that legislative prayer is treated "differently from prayer at school events," and therefore "[t]he Council's decision to provide only nonsectarian prayers places it squarely within the range of conduct permitted" by authority from this Court and the Fourth Circuit. Id. Finally, the panel denied Turner's free exercise claims, observing that Turner was "not forced to offer a prayer that violated his deeply-held religious beliefs," rather he was "given the chance to pray on behalf of the government." (App., p. A-10). Because Turner remained free to pray on his own behalf and in accordance with his conscience "in nongovernmental endeavors," the Court determined that the City Council had not violated his free exercise rights. Id. The Fourth Circuit panel simply did not address Turner's argument that because there were no standards for determining what was and was not

"non-denominational prayer," the city's policy was vague and overbroad.

REASONS FOR GRANTING THE WRIT

This case presents important Federal questions involving the discriminatory treatment of individually-composed prayers given by a similarly-situated class of speakers at the opening of city council meetings. By censoring Councilor Turner from closing his prayer in the name of Jesus Christ, while permitting other Council Members to pray in the name of "Almighty God" and "Most Merciful Father," this case sits at the intersection of individual Free Speech rights and legislative prayer and poses unique and important questions that should be resolved by this Court: (1) Is legislative prayer "government speech"? (2) Even if legislative prayer is government speech, does a targeted policy leveled and enforced against Councilor Turner's speech constitute unlawful viewpoint discrimination when other Council Members are permitted to pray in the name of another deity? (3) Can government prescribe the content of legislative prayer? (4) Does the failure to provide standards outlining the boundaries of "non-denominational" prayer give impermissible unrestrained discretion to governmental officials to censor speech?

The view adopted by the City Council, the district court and the Fourth Circuit cannot be squared with long-standing First Amendment protections against viewpoint discrimination and this Court's historic ban on government efforts to prescribe or proscribe the content of prayer. In fact,

despite the Fourth Circuit's acknowledgment that the policy adopted by the City Council is not *compelled* by the Establishment Clause, the ramifications of this decision are already being felt as state entities crack down on what they (erroneously) perceive to be impermissible sectarian or denominational prayers. For example, in reaction to this decision the Virginia state troopers recently announced a policy prohibiting denominational or sectarian prayer by their chaplains.

The decision also threatens to sweep an entire category of individual free speech rights out of the constitution by holding that legislative prayer is "government speech," thus not only precluding individuals from challenging viewpoint discrimination when prohibited from praying individually composed, non-proselytizing prayers, but in the process ironically adding the state imprimatur of prescribed prayer.

In reaching this result, the Fourth Circuit's decision turns the government speech doctrine on its head. This doctrine traditionally has been applied only where the government actually controlled and composed the precise content of the speech at issue, such as where the government advertised or provided counseling on military affairs. The doctrine should not be stretched to reach individually-composed prayers that, notwithstanding the City Council's prescription of "non-denominational" prayer and proscription of the name of Jesus, are each crafted and offered by individual City Council members at its meetings.

Indeed, under the Fourth Circuit's formulation the City Council could have crafted a complete prayer and required individual Councilors to recite the scripted prayer on the Council's behalf. Such a prescription of prayer would be unprecedented in Establishment Clause history.

The policy is also defective because the City Council, by permitting only "nondenominational" prayer," has inserted itself into an ecclesiastical realm. This realm is beyond its competence to define, and the City Council's actions have granted government officials "virtually unrestrained power" to enforce what is otherwise a highly ambiguous and ill-defined term.

Finally, this Court has not addressed legislative prayer since its 1983 decision in Marsh v. Chambers. Over the past 25 years, the lower courts have diligently permitted such prayers but have too often imposed additional restrictions never envisioned by this Court. In attempting to square the legitimacy of legislative prayer with the perceived boundaries of the Establishment Clause, courts like the Fourth Circuit have now effectively imposed a prescribed framework for prayers offered by individuals at legislative meetings, which permits mention of some forms of denominational deities such as "Almighty Father" and "most merciful Father," but proscribes any use whatsoever of the name of Jesus Christ, even when there is no evidence that anyone has used the prayer

opportunity to proselytize or advance one religion at the expense of another.[4]

This Court should grant review for all of these reasons and reverse the Fourth Circuit's decision.

I. The Fourth Circuit's Decision Conflicts With This Court's Government Speech Jurisprudence.

In the relatively short lifespan of the government speech doctrine, this Court has never deemed legislative prayer to constitute government speech and should not do so now. The government speech doctrine has been applied where the government controls the actual content of the speech, but it has not been applied in circumstances like this case, where individual City Council members personally compose the content of their prayers and where the government itself cannot, as a *nonbelieving* entity, even constitutionally offer a

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[4] The Court of Appeals justified the City Council's policy on grounds that it advanced "the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize." (App., p. A-9). But Marsh says that government should avoid parsing prayers unless the prayer proselytizes or seeks to advance a particular religion to the exclusion of others, Marsh v. Chambers, 463 U.S. 783, 795 (1983), and Lee states that government should, in any event, entirely avoid prescribing official prayer. Lee v. Weisman, 505 U.S. 577, 588 (1992). The Fourth Circuit has undertaken that analysis where the circumstances warrant it. See, e.g., Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004) (observing that the trial court made detailed factual findings regarding the impermissible exploitation of the prayer opportunity).

prayer.[5] In each of the instances where the doctrine has been applied, the *government* was indisputably the speaker and dictated the precise content of each communication.[6] But when it comes to religious speech, and even legislative prayer, the message is "spoken" contemporaneously by a specific individual who is the "speaker" or "author" of the religious

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[5] See Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 560-61 (2005) (finding beef advertising campaign constituted government speech where "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government" and "the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign"). Likewise, where the government speaks through its military recruiters or funds family planning counseling by medical doctors this Court has concluded that such communications also constitute government speech. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297 (2006) (military recruiters); Rust v. Sullivan, 500 U.S. 173 (1991) (family planning counseling).

[6] In the context of the Establishment Clauses, this Court has addressed circumstances where the government may "speak" through the display of symbols, such as crèches or the Ten Commandments. In each of these contexts, the Supreme Court has both upheld such displays and struck them down as unconstitutional. See Van Orden, 125 S. Ct. 2854 (upholding Ten Commandments display); McCreary County v. American Civil Liberties Union of Ky., 125 S. Ct. 2722 (2005) (finding Ten Commandments display unconstitutional); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (finding display of crèche in courthouse unconstitutional); Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding display of crèche on public grounds). In none of these cases, however, was the message individually spoken or composed in a framework where other individuals were also permitted to advance individually composed religious messages.

message in the context of other similarly-situated individuals who do the same thing. To call this "government speech" is to create a legal fiction that is not sustainable on the facts and should not be incorporated into the law.

Outside the school context, this Court has never found prayer or other "official" acts of worship by an identifiable individual to be "government speech."[7] And even in the school context, whenever the Court has detected any indication that the prayers constituted "government speech" because their content was effectively prescribed or proscribed by the state, it has ruled that such prayers are unconstitutional. See, e.g., Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000) (striking down prayers at school football games); Lee v. Weisman, 505 U.S. 577 (1992) (striking down officially sponsored graduation prayers). In sum, there is no precedent from this Court supporting the conclusion that a legislative prayer offered by an identifiable individual constitutes "government speech."

The reason, of course, is that this Court has embraced a long-standing prohibition barring the government from dictating the content of "official" prayer. As Justice Kennedy concluded in Lee v. Weisman, "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official*

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[7] In Marsh v. Chambers, 463 U.S. 783, this Court never considered whether the legislative prayers were private or government speech, although it conducted its analysis under the rubric of the Establishment Clause.

prayers for any group of the American people to recite as a part of a religious program carried on by government .... The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." 505 U.S. at 588-90 (emphasis added).

In light of this mandate, it is clear that the government may not itself "pray" or prescribe prayer. Thus, it may not dictate the content of a prayer, and legislative prayer therefore cannot be government speech. The Fourth Circuit's decision is contrary to the authorities of this Court, and this Court should grant review to establish clearly and unmistakeably that legislative prayer is not government speech.[8]

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[8] In Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), the Fourth Circuit observed that some speech may be neither wholly government speech nor wholly private speech but rather a form of "hybrid" speech incorporating elements of both government and private speech. The Rose court held that such hybrid speech was entitled to the same protections from viewpoint discrimination that private speech enjoys. Thus, should this Court determine that Councilor Turner's prayers are not purely private speech, it should grant review, in the alternative, to determine whether legislative prayer constitutes such "hybrid" speech (and is therefore protected from viewpoint discrimination).

II. The Fourth Circuit's Holding Directly Conflicts With This Court's Decisions Barring Viewpoint Discrimination, Even When Such Discrimination is Inspired by a Desire to Avoid an Establishment Clause Violation.

Whether or not legislative prayer is "government speech," the panel decision below directly conflicts with the principles in this Court's decisions prohibiting religious viewpoint discrimination. This Court consistently has held that government may not target or censor speech solely because of the speaker's religious viewpoint.[9] For example, in Rosenberger, the refusal of the University of Virginia Student Activity Fund to fund Wide Awake, a religious magazine, was impermissible because the refusal was based solely on the religious viewpoint of the magazine. Id. at 828-37. In its decision, the Court also found that

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[9] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (holding that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" and recognizing that this doctrine prohibits regulation of religious viewpoints); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 393-94 (1993) ("It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."); Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("[W]e are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech.").

scrutinizing the student speech for religious content raised "the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." Id. And even if the prayer in the present case were "government speech," government may not *apply* a policy in a manner that discriminates based on viewpoint by permitting one set of City Council members to pray in the name of their preferred denominational deity and at the same time proscribe Councilor Turner from praying in the name of his.[10]

This Court's analysis in Rosenberger (and in the prior decisions of Widmar and Lamb's Chapel) confirms that the City Council's "non-denominational" prayer policy is unconstitutional. Here, as in Rosenberger, the City Council opened a forum for prayer at its meetings and by historic tradition and practice established a procedure whereby individual City Council members, as the class of permissible speakers in the forum, were

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[10] See Sons of Confederate Veterans v. Commissioner of the Virginia Dep't of Motor Vehicles, 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing *en banc*) ("When a legislative majority singles out a minority viewpoint in such pointed fashion, free speech values cannot help but be implicated."); Id. at 245 (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]he particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both" triggering potential unlawful viewpoint discrimination); Planned Parenthood v. Rose, 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring in the denial of rehearing *en banc*) ("It is quite another for the state to privilege private speech on one side—and one side only—of a fundamental moral, religious, or political controversy.").

permitted to offer individually-composed prayers on a rotating basis. Councilor Turner, as a member of the Council, was within the class of permissible speakers in the forum. His prayers fit the general content permitted within the forum (i.e., he is not proffering, for example, readings from his favorite novels).[11] Under these circumstances, the City Council may not adopt a policy, and enforce it, specifically to censor Councilor Turner's religious *viewpoint* unless the Council's action survives "strict scrutiny" – in other words, unless (i) the censorship is justified by a compelling state interest, and (ii) it is narrowly tailored (the two primary components in the "strict scrutiny" analysis). Widmar, 454 U.S. at 269-70.

Unquestionably, the City Council's policy was aimed directly at Councilor Turner and his practice of closing prayer in the name of Jesus Christ. Unquestionably, after the policy was adopted, other City Council members were permitted to pray in the name of other deities and to utter prayers reflecting denominational influences (*see* note 2 above and accompanying text), whereas Councilor Turner was excluded from praying. The policy's targeting of Councilor Turner's prayers is not supported by any compelling state interest. Indeed, since Rosenberger

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[11] See Rosenberger, 515 U.S. at 829-30 (recognizing the distinction between "on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations").

vitiates any suggestion that fear of an Establishment Clause violation would be a compelling state interest, the City Council has no justifiable compelling interest to sustain its policy, and its actions constitute unconstitutional viewpoint discrimination, even if the legislative prayer were "government speech."

III. The Fourth Circuit's Decision Conflicts With This Court's Prior Rulings That the State May Not Prescribe or Proscribe the Content of An Official Prayer.

This Court should also grant certiorari in this case because the City of Frederickburg has promulgated a policy that, in effect, prescribes a mode of prayer advancing a faith that promotes "the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies." Lee v. Weisman, 505 U.S. 577, 588 (1992). As noted above, this Court has expressly held that government officials may not prescribe or proscribe the content of such official prayers, even when motivated by an effort to ensure that such prayers are "nonsectarian." Id. In light of this authority, the City Council's adoption and application of its policy violates the Establishment Clause prohibition on government prescription of official prayers, and the Fourth Circuit's decision directly conflicts with this holding.

In Lee, this Court considered a challenge to a high school graduation prayer policy. In that case,

the school district invited a rabbi to give the prayer, provided him with a booklet titled "Guidelines for Civic Occasions" and "advised him that his prayers should be nonsectarian." Id. at 588. In a majority opinion authored by Justice Kennedy, this Court observed as follows:

> It is a cornerstone principle of our Establishment Clause jurisprudence that *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government* ... and that is what the school officials attempted to do.
>
> . . . .We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. . . . If common ground can be defined with permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. *But though the First Amendment does not allow the government to stifle prayers which*

> *aspire to these ends, neither does it permit the government to undertake that task for itself.*
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.
> . . . . And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which that all creeds must be tolerated and none favored. *The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.*

Id. at 588-90 (emphasis added and internal citations omitted). Notwithstanding this broad admonition from this Court, the Fourth Circuit found that the proscription of the content of an official prayer was permitted because the City Council's policy was "designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith." (App. A, p. 6). This holding *directly* conflicts with this Court's Establishment Clause jurisprudence, and this Court should grant review to clarify that the City of Fredericksburg in its misguided policy cannot

establish civil religion through a policy permitting only "non-denominational" prayer.

IV. The Fourth Circuit's Decision Conflicts With This Court's Authority Striking Down Unconstitutionally Vague and Overly Broad Policies Censoring Speech.

The City Council's failure to define adequately what is and is not "non-denominational" prayer also presents a serious constitutional question. It goes without saying that government is not qualified to make ecclesiastical judgments. In this case, not only has the City Council established a religious test, it has failed to define what is and what is not "non-denominational," and it has failed to designate the person tasked with deciding this fundamental question. This Court should therefore grant review to determine whether the City Council has improperly entangled itself in ecclesiastical questions in a manner that grants "virtually unrestrained power" to governmental officials to act in an area that is far beyond their qualifications and competence.

This Court has found that vague and overly broad policies infringing Free speech violate the Constitution when government officials are given virtually unrestrained power to censor speech. See Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (Airport policy banning "nonairport related" speech was void on its face for vagueness and overbreadth.) The concerns

expressed by this Court in Jews for Jesus are heightened here since the government is attempting to apply the undefined, and highly ambiguous, religious term "non-denominational." It throws government officials into a "murky" thicket (id. at 576) which, if permitted, grants them "virtually unrestrained power" where the "opportunity for abuse . . . is self-evident." Id.

The City Attorney memorandum setting forth the recommendation ultimately adopted by the Council stated as follows:

> Council may continue to offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work on the City, as part of its official meeting. At this time, there is no clear legal authority to permit a denominational prayer—one invoking Jesus Christ, for example—as part of the official meeting.

In addition, during the November 8, 2005 meeting the motion voted upon and approved was to continue offering "non-denominational" prayers. Thus, the touchstone for whether a Council Member is permitted to pray is a governmental determination as to whether his or her prayer will be, or is expected to be, "non-denominational" in content.

The policy's reliance on the undefined term "non-denominational" – which has no settled

meaning in jurisprudence – fails to satisfy constitutional standards. The City Council may classify virtually any religious speech as "denominational" given the vagueness of the term. To cite just a few examples of the vagueness of the policy, Councilors have made multiple references to "Almighty God" and "most merciful Father" since the passage of the policy in November 2005.[12] It is not clear why these references would not be considered denominational and in violation of the policy since they each have characteristics unique to the traditions of specific religious faiths – for example, the term "Father" implies a son, which in the Christian faith is Jesus Christ. Likewise, the content of most of the prayers offered by City Council members reflects denominational assumptions and predilections. See note 2, supra.

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[12] Similar troubling questions have been raised in appeals of other recent legislative prayer cases challenging prayer mentioning the name of Jesus Christ. For example, the following questions were reportedly raised at oral argument before the United States Court of Appeals for the Eleventh Circuit on August 19, 2008, in the appeal of Pelphrey v. Cobb County, Record No.'s 07-13611 & 07-13665 (11th Cir. 2008): (1) "What about King of Kings? Is that sectarian? What about Lord of Lords? The God of Abraham? What about the God of Abraham, Moses, Jesus and Muhammad? Or Heavenly Father (noting that 'Heavenly Father' could refer to the Divine Trinity)"; (2) "Does the county need to get a copy of a prayer before it's given to make sure it's not sectarian? How can this be done "without some sort of censorship?"; (3) "If some prayers must be edited and 'watered down' to make sure they are not identified with a certain denomination, isn't it just government prayer?" See Rankin, Court Hears Arguments Over Prayers at Cobb Commission, Atlanta Journal-Constitution, August 20, 2008.

The only conclusion one can draw from these references is that the City Council is free to classify *any prayer* with which they disagree as violating their policy – which renders the policy unconstitutional on an as applied basis as well.

Furthermore, fixed meaning for the term used in the new policy is elusive. The word "non-denominational" is generally undefined, other than as the reverse of "denominational." The latter term means "sponsored by, or under the control of, a religious denomination; sectarian." Webster's New World Dictionary (2d College Ed. 1980). Under this definition, prayer not "sponsored by or under the control of a religious denomination" would potentially be permissible under the policy. And to the extent the policy intended to use the term "nonsectarian," this Court in Lee has precluded that choice.[13]

In sum, the term "non-denominational" is vague and overly broad. It is not only capable of conflicting interpretations (and, in fact, given the current prayers in City Council, apparently has little settled meaning), but the term "denominational" describes conduct that does not violate the Establishment Clause (as recognized by this Court in Marsh when it refused to preclude the Nebraska state legislature from employing a chaplain of one

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[13] City Council members are limited, apparently, not only from using language in their prayers that violates the Establishment Clause but also language that does not conflict with it. And there is no direction given for where the line is with any given prayer – presumably somewhere in a vast sea of gray between the terms "merciful Father" and "Jesus Christ."

denomination for many years). Given this vagueness and overbreadth, the City Council has virtually unbridled discretion to censor prayers with which it does not agree. And such unbridled discretion, as this Court has recognized, violates the First Amendment. Thus, this Court should grant review to consider whether in light of these demonstrated deficiencies, the City Council prayer policy is unconstitutionally vague and overbroad.

V. This Court Has Not Addressed Legislative Prayer In Over 25 Years – as the Decision Below Illustrates, Lower Court Legislative Prayer Jurisprudence Has Increasingly Abandoned the Principles Announced in Marsh v. Chambers.

This Court has not addressed legislative prayer since its decision in Marsh v. Chambers, 463 U.S. 783 (1983), where it found that prayer offered by a Presbyterian chaplain employed by the Nebraska Unicameral to open each session of the legislature did not violate the Establishment Clause. In deciding that case, this Court explicitly declined the plaintiff's request to delve into the content of the specific prayers offered. Instead, it observed that, "[t]he content of the prayer is not of concern to judges" unless the prayer opportunity "has been exploited to proselytize or advance any one ... faith or belief." Id. at 794-95. In the absence of any such evidence, this Court held that, "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." Id. at 795.

Despite this Court's expressed precautions, municipalities, state entities and lower courts, as the Fourth Circuit's decision illustrates, have nevertheless focused on the content of specific prayers, even without making any prior determination under the criteria advanced in Marsh as to whether the prayer is proselytizing or exploits one religion over another.[14] State entities like the City Council have instead passed unconstitutional policies that discriminate against the viewpoints expressed by those praying from different religious backgrounds. None of these outcomes was anticipated by this Court's ruling in Marsh, and, in fact, the language of Marsh seems to assume diversity in legislative prayer. These departures from Marsh have also sparked widespread scholarly

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[14] See, e.g., Wynne v. Town of Great Falls, supra note 4, 376 F.3d 292; Simpson v. Chesterfield County Bd. of Sup'rs, 404 F.3d 276 (4th Cir. 2005), cert. denied, 126 S. Ct. 426 (2005) (holding that county program inviting outside ministers to provide legislative prayer was government speech); Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006) (voting 2-1 to uphold stay forbidding invocation of sectarian references) (Kanne, J., dissenting) rev'd sub nom, Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly, 2007 U.S. App. LEXIS 25363 (7th Cir. 2007); Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2007) (voting 2-1 to forbid invocation with sectarian references) (Clement, J., dissenting); 494 F.3d 494, 497 (5th Cir. 2007) (rev'd on different grounds); But see Pelphrey v. Cobb County, 410 F. Supp. 2d 1324, 1334 n. 10 (N.D. Ga. 2006) ("[I]solated sectarian references, without more, [are] insufficient to find prayer violated prohibitions of *Marsh*") (citing Newdow v. Bush, 355 F. Supp. 2d 265, 289 (D.C. Cir. 2005)); Pelphrey v. Cobb County, Record No.'s 07-13611 & 07-13665 (11th Cir. 2008).

comment.[15] Rather than permitting the dumbing down of legislative prayer to a civil religion that robs the nation of its diversity and the opportunity for religious tolerance and accommodation, this Court should grant review in this case to restore the principles of Marsh and to acknowledge that the Establishment Clause does not require that legislative prayer extinguish the diversity of religious viewpoints in our country.

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[15] See, e.g., Christopher C. Lund, Marsh v. Chambers Revisited: The Second Generation of Legislative Prayer Cases (forthcoming 2009); Kenneth A. Klukowski, In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer, 6 Georgetown J.L. & Pub. Pol'y 218 (2008); Robert Luther III & David B. Caddell, Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis, 48 Santa Clara L. Rev. 569 (2008); Robert J. Delahunty, "Varied Carols": Legislative Prayer in a Pluralist Polity, 40 Creighton L. Rev. 517 (2006-07); Anne Abrell, Note: Just a Little Talk With Jesus: Reaching the Limits of the Legislative Prayer Exception, 42 Val. U. L. Rev. 145 (2007); Jeremy G. Mallory, Comment: "An Officer of the House Which Chooses Him, and Nothing More": How Should Marsh v. Chambers Apply to Rotating Chaplains?, 73 U. Chi. L. Rev. 1421 (2006).

CONCLUSION

This Court should grant review.

Respectfully submitted,

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October 20, 2008

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HASHMEL C. TURNER, JR.,
Plaintiff-Appellant,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,
Defendants-Appellees.

No. 06-1944

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION,
Amicus Supporting Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(3:06-cv.00023-JRS)

Argued: March 19, 2008

Decided: July 23, 2008

Before Sandra Day O'CONNOR, Associate Justice (Retired), Supreme Court of the United States,

sitting by designation, and MOTZ and SHEDD, Circuit Judges.

Affirmed by published opinion, Associate Justice O'Connor wrote the opinion, in which Judge Motz and Judge Shedd joined.

COUNSEL

ARGUED: R. Johan Conrod, Jr., Kaufman & Canoles, P.C., Norfolk, Virginia, for Appellant. Robert Martin Rolfe, Hunton & Williams, Richmond, Virginia, for Appellees. **ON BRIEF:** J. Bradley Reaves, Kaufman & Canoles, P.C., Norfolk, Virginia; James J. Knicely, Knicely & Associates, P.C., Williamsburg, Virginia, for Appellant. Maya M. Eckstein, Terence J. Rasmussen, Thomas K. Johnstone, IV, Hunton & Williams, Richmond, Virginia; Elliot M. Mincberg, Judith E. Schaeffer, People for the American Way Foundation, Washington, D.C., for Appellees. Rebecca K. Glenberg, American Civil Liberties Union of Virginia Foundation, Inc., Richmond, Virginia, for Amicus Supporting Appellees.

OPINION

O'CONNOR, Associate Justice (Retired):

Appellant Hashmel Turner claims that the Council for the City of Fredericksburg, Virginia, violated his First Amendment rights when it

implemented a policy beginning in 2005 requiring that legislative prayers be nondenominational. Because the prayers at issue here are government speech, we hold that Fredericksburg's prayer policy does not violate Turner's Free Speech and Free Exercise rights. Likewise, the requirement that the prayers be nondenominational does not violate the Establishment Clause.

I.

The Council of the City of Fredericksburg, Virginia ("the Council") begins every meeting with a Call to Order, which consists of an opening prayer offered by one of the Council's elected members followed by the Pledge of Allegiance. Only Council members are allowed to offer the opening prayer, and the Council members rotate the Call to Order duty. Until 2005, members of the Council were allowed to offer denominational prayers.

Turner was first elected to the Council in 2002. He is an ordained minister and a part-time pastor of the First Baptist Church of Love. Turner's religious beliefs require him to close his prayers in the name of Jesus Christ. Turner's prayers on behalf of the Council reflected this practice.

In 2005, the American Civil Liberties Union threatened to file a lawsuit if the Council's practice of opening with sectarian prayers continued. The City Attorney examined the relevant case law and concluded that the safest course of action was to continue offering prayers, but to offer nondenominational prayers which did not invoke the

name of Jesus Christ. The Council adopted their attorney's suggestion and promulgated a prayer policy on November 8, 2005. Turner abstained from voting in that decision.

On November 22, 2005, Turner's name came to the front of the prayer rotation. Knowing Turner's beliefs on the matter, the Mayor asked Turner if he planned to close his prayer in the name of Jesus Christ, in violation of the newly adopted policy; Turner said that he would. The Mayor refused to recognize Turner and called on another Council member to deliver the opening prayer instead.

Turner filed this suit, claiming that the Council's prayer policy was an unconstitutional establishment of religion, and that it violated his Free Exercise and Free Speech rights. The district court granted summary judgment to the Council, and this appeal followed.

II.

As a preliminary matter, we must decide whether the legislative prayer at issue here is speech that must be attributed to the government, or whether the Call to Order prayers were given in a personal capacity.

The Fourth Circuit has adopted a four-factor test for determining when speech can be attributed to the government. In order to determine whether the speech in question is government or private speech, we consider:

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

Sons of Confederate Veterans, Inc. v. Comm'r of Dep't of Motor Vehicles, 288 F.3d 610, 618 (2002), citing *Wells v. City & County of Denver*, 257 F.3d 1132, 1141 (10th Cir.2001). Applying these factors, we conclude that the legislative prayer at issue here is governmental speech.

First, the purpose of the program suggests that the speech is governmental in nature. The prayer is an official part of every Council meeting. It is listed on the agenda, and is delivered as part of the opening, along with the Pledge of Allegiance. The person giving the prayer is called on by the Mayor. The prayers typically ask that Council members be granted wisdom and guidance as they deliberate and decide how best to govern the city. We conclude that the central purpose of the Council meeting is to conduct the business of the government, and the opening prayer is clearly serving a government purpose.

As to the second and third factors, the Council itself exercises substantial editorial control over the speech in question, as it has prohibited the giving of

a sectarian prayer. While Turner is the literal speaker, he is allowed to speak only by virtue of his role as a Council member. Council members are the only ones allowed to give the Call to Order.

The only factor about which there is any question is whether the government or the Council member who delivers the prayer bears the ultimate responsibility for its content.

In the prayers Turner offered before the current prayer policy was adopted, he prayed, "As we are about the business of this locality, we ask Lord God, that you will cleanse our hearts and our minds that we make the right decisions that's best suited for this locality." JA 489.

It is true that Turner and the other Council members take some personal responsibility for their Call to Order prayers. But given the focus of the prayers on government business at the opening of the Council's meetings, we agree with the District Court that the prayers at issue are government speech.

Turner has not cited a single case in which a legislative prayer was treated as individual or private speech. Indeed, the Fourth Circuit has determined that more difficult cases than this one should be classified as government speech. For instance, in *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir.2005), the Board of Supervisors invited religious leaders from congregations throughout Chesterfield County to give prayers on a rotating basis. *Id.* at 279. The

identity of the speaker, and the responsibility for the speech, was, in that case, less clearly attributable to the government than the speech here, because the speakers there were not government officials. *Simpson* nonetheless held that "the speech ... was government speech." *Id.* at 288.

III.

Turner claims that, under the Establishment Clause, the government may not dictate the content of official prayers. He points to *Lee v. Weisman*, 505 U.S. 577 (1992) which held that a school principal, who directed a rabbi to deliver a nonsectarian prayer, violated the Establishment Clause. The Court explained that "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.' "*Id.* at 588 (quoting *Engel v. Vitale*, 370 U.S. 421, 425). Thus, Turner says, the government cannot require that nonsectarian prayers be given.

Turner's argument misses the mark. As the *Lee* Court went on to explain, the school's direction to deliver a nonsectarian prayer was a "good-faith attempt to ensure that the sectarianism which is so often the flashpoint for religious animosity [was] removed from the graduation ceremony." *Id.* But the Establishment Clause question that was raised was not whether the school had made a good-faith attempt to accommodate other religions; instead, the question was "the legitimacy of its undertaking that

enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend." *Id.* at 589. We do not read *Lee* as holding that a government cannot require legislative prayers to be nonsectarian. Instead, *Lee* established that government cannot compel students to participate in a religious exercise as part of a school program.

The Supreme Court of the United States has treated legislative prayer differently from prayer at school events: "[T]here can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment.' " *Marsh v. Chambers,* 463 U.S. 783, 792 (1983) Opening prayers need not serve a proselytizing function, and often are an "acknowledgement of beliefs widely held among the people of this country." *Id.* So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to "parse the content of a particular prayer." *Id.* at 795; *see also Wynne v. Town of Great Falls,* 376 F.3d 292, 298 (4th Cir.2004).

We need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer. In *Marsh,* the legislature employed a single chaplain and printed the prayers

he offered in prayerbooks at public expense. By contrast, the legislature in *Simpson* allowed a diverse group of church leaders from around the community to give prayers at open meetings. *Simpson*, 404 F.3d at 279. Both varieties of legislative prayer were found constitutional. The prayers in both cases shared a common characteristic: they recognized the rich religious heritage of our country in a fashion that was designed to include members of the community, rather than to proselytize.

The Council's decision to provide only nonsectarian legislative prayers places it squarely within the range of conduct permitted by *Marsh* and *Simpson*. The restriction that prayers be nonsectarian in nature is designed to make the prayers accessible to people who come from a variety of backgrounds, not to exclude or disparage a particular faith. The Council's decision to open its legislative meetings with nondenominational prayers does not violate the Establishment Clause.

IV.

Appellant also argues that the prayer policy violates his Free Exercise and First Amendment rights. As *Simpson* explained:

> [T]his issue turns on the characterization of the invocation as government speech.... The invocation is not intended for the exchange of views or other public discourse. Nor is it intended for the exercise of one's

> religion.... The context, and to a degree, the content of the invocation segment is governed by established guidelines by which the [government] may regulate the content of what is not expressed.

Simpson, 404 F.3d at 288 (internal citations omitted) (second omission in original); *see also Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker.").

Turner was not forced to offer a prayer that violated his deeply-held religious beliefs. Instead, he was given the chance to pray on behalf of the government. Turner was unwilling to do so in the manner that the government had proscribed, but remains free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience.

His First Amendment and Free Exercise rights have not been violated.

For these reasons, the decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ENTERED: AUGUST 14, 2006

HASHMEL C. TURNER, JR., Plainitff, v. CITY COUNCIL OF THE CITY OF FREDERICKSBURG, et al., Defendants.	Civil Action Number 3:06CV23

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants, the City Council of the City of Fredericksburg, Virginia ("City Council") and Dr. Thomas J. Tomzak's ("the Mayor") Motion for Summary Judgment and Plaintiff, Hashmel C. Turner, Jr.'s ("Councilor Turner") Motion for Summary Judgment. For the reasons to follow, Defendants' Motion for Summary Judgment is granted. Plaintiff's Motion for Summary Judgment is denied.

I.

The City Council consists of seven elected members, including Councilor Turner. It holds public meetings every two weeks to conduct business. The Mayor presides over City Council meetings and recognizes individuals to speak at the meetings.

At each City Council meeting, there is one opening prayer, which has been the City Council's custom and practice since the 1950s. The City Council uses a prayer rotation whereby City Council members place their names in the prayer rotation to deliver their prayer. The Mayor recognizes a council member to deliver the City Council's opening prayer. Members of the public are asked to stand for the prayer, and many of them close their eyes and bow their heads during prayer. The opening prayer is listed on the agenda after the "Call to Order" and before the "Pledge of Allegiance."

Councilor Turner assumed a seat on the City Council in July 2002. Turner chooses to invoke the name of Jesus Christ in his prayers. On June 10, 2003, he closed the opening prayer with the words, "in Jesus' name, my Savior, I pray. Amen." On July 23, 2003, Councilor Turner closed the prayer with the words, "in the name of Jesus Christ, we thank you for what you're going to do. Amen."

No other City Council member has mentioned the name of Jesus Christ in his/her prayer since 2002. Other Council members from 2002 to the present have used various names to invoke a deity,

including, "Almighty God," "Father," or "Heavenly Father."

In July 2003, the American Civil Liberties Union (ACLU) of Virginia contacted the City Council and asked that Councilor Turner refrain from using the official prayer to deliver explicitly Christian prayers. In response, Councilor Turner removed his name from the prayer rotation. In October 2003, Councilor Turner placed his name back on the prayer rotation and began to deliver prayers invoking the name of Jesus Christ. On July 26, 2004, the ACLU of Virginia sent a second letter to the City Council, threatening to seek judicial relief if Councilor Turner continued to invoke the name of Jesus Christ in his opening Council prayers.

On November 8, 2005, the Council voted 5-1 with Councilor Turner abstaining, to adopt a policy offering only "non-denominational" prayers. The prayer policy was a recommendation of the City Attorney, which states that the City Council could "continue its current practice of offering the official prayer to a non-denominational 'God,' without invoking the name of a specifically Christian (or other denominational) deity." Alternatively, the City Attorney recommended that Council members could participate in private sectarian prayer in the City Council's chambers before the Council meetings were called to order. The private prayer "could be offered by a member of Council or a member of the clergy" and "could be offered in an expressly denominational (Christian) tradition."

Councilor Turner was scheduled to give the opening prayer on November 22, 2005. The Mayor asked Councilor Turner whether he would continue to invoke the name of Jesus Christ in his prayers. Councilor Turner said he would, and as a result, the Mayor did not recognize Councilor Turner to give the opening prayer.

On January 10, 2006, Councilor Turner filed a Complaint against the Mayor and the City alleging violations of his First Amendment rights of Free Speech, Free Exercise of Religion, and non-Establishment of religion and equal protection under the law. On May 30, 2006, Defendants moved for Summary Judgment. On June 23, 2006, Councilor Turner filed a cross motion for Summary Judgment.

II.

A motion for summary judgment may be granted "only if the pleadings, depositions, interrogatory answers, admissions, and affidavits show 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " Magill v. Gulf & W. Indus., Inc., 736 F.2d 976, 979 (4th Cir.1984)(quoting Fed.R.Civ.P. 56(c); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir.1992). "Where ... the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." United States v. Lee, 943 F.2d 366, 368 (4th Cir

.1991) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

After the movant has met its burden of showing that no genuine issue of material fact exists, the non-moving party may not rest on its pleadings, but must come forward with specific facts showing that evidence exists to support its claims and that there is a genuine issue for trial. Celotex, 477 U.S. at 324. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." Id. A mere scintilla of evidence in support of the plaintiff's claim is not sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). There must be enough facts to support a verdict for him. Id. at 252-54.

III.

A. Councilor Turner's opening prayer is government speech.

The parties dispute whether Councilor Turner's speech is "government speech" or private speech. Plaintiff contends the opening prayer is private speech, and the City Council's measure impermissibly censors his speech based on his religious viewpoint. Defendants argue Councilor Turner's sectarian prayer is government speech that endorses a specific religion and thus violates the Establishment Clause.

There is a "crucial difference between *government* speech endorsing religion, which the

Establishment Clause forbids, and *private* speech endorsing religion which the Free Speech and Free Exercise Clause protect." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (emphasis in original)). If the opening prayer is "government speech," the First Amendment guarantees with respect to free expression and exercise of religion are not implicated. "No individual has a First Amendment right to offer an official prayer reflecting his personal beliefs." Hinrichs v. Bosma, 410 F.Supp.2d 745, 750 (S.D.Ind.2006)

Plaintiff contends that he offers his prayer in his individual capacity and not on behalf of the entire City Council. Plaintiff contends the central purpose of the City Council meeting it to serve both the Council members and the public. Plaintiff further asserts the Council members historically exercised full editorial control over the content of the prayers, and the City Council members are the literal speakers. Finally, Plaintiff states the City Council members bear the ultimate responsibility for their prayers. Therefore, Councilor Turner contends his prayers are private speech, or at a minimum hybrid speech.

In order to determine the character of Plaintiff's speech, this Court looks at the purpose and effect of the opening prayer. Plaintiff's characterization of his speech ignores the primary purpose of the prayer, and the effect it has on others. First, the central purpose of the program in which the speech occurs is to conduct City Council business. Second, the local government can (and

must, to comply with the Establishment Clause) exercise editorial control over the speech's content. Third, the identity of the speaker, Councilor Turner is a government official, acting in his official capacity. Contrary to Councilor Turner's assertions, the ultimate responsibility for the content of the speech, rests upon the City Council on whose behalf the prayer is offered. Additionally, the Mayor presides over the City Council meetings in his official capacity, and recognizes individual Council members to deliver the City Council's opening prayer. The prayer may not be offered without the Mayor's permission. The prayer by the City Council member is an official agenda item, listed on the meeting agendas. In similar situations, other courts, including the Fourth Circuit have held that legislative prayer such as Councilor Turner's, is government speech. See Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 288 (4th Cir.2005) (holding the opening prayer of the county board was government speech, where it was not intended for public discourse). See also Hinrichs, 410 F.Supp.2d at 750 (holding the opening prayer of the state legislature was government speech where the speaker of the house "control[led] access to this particular ... forum for official prayer" and had "not attempted to create a public forum in which all [we]re welcome to express their faiths"). Considering both the purpose and effect of the opening prayer, Councilor Turner's opening prayer is government speech, and thus, the First Amendment guarantees are not implicated.

B. Since the opening prayer is government speech, it must abide by the mandates of the Establishment Clause.

The First Amendment, made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...."U.S. Const. amend. I.. Because the City Council's opening prayer is government speech, it must make content-based decisions, subject only to the proscriptions of the Establishment Clause. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 820 (1995). The City Council can restrict what is said on its behalf during the opening prayer without infringing on the speaker's viewpoint. Id.

1. The Supreme Court and this circuit require that legislative prayer be nonsectarian.

The Supreme Court has established in Marsh v. Chambers, that the Establishment Clause permits a legislative body to invoke divine guidance as the City Council has done before engaging in its public business. 463 U.S. 783, 792 (1983) (defining a legislative prayer as an act to "invoke Divine guidance on a public body entrusted with making laws...."). The Marsh Court emphasized, that although legislative prayers do not "establish" religion, legislative bodies must ensure that any opening prayers are "nonsectarian." Id. at 793. Notably, the Supreme Court has read *Marsh* as respecting the tradition of legislative prayer, while

precluding sectarian prayer. In County of Allegheny v. ACLU, the Supreme Court held unconstitutional the display of a creche in a county courthouse. 492 U.S. 573 (1989) In Allegheny, the Court explained that Marsh "recognized that not even the 'unique history' of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." Id. at 603.

The Fourth Circuit has also confronted the question of sectarian legislative prayer directly. Relying on Marsh, in Wynne v. Town Council of Great Falls, the Fourth Circuit held that sectarian legislative prayers-which invoke the name of a certain deity, as Councilor Turner has done here-are unconstitutional. 376 F.3d 292, 294 (4th Cir.2004). The court's decision in Wynne upholds only nonsectarian opening prayer. It stated:

> Public officials' brief invocations of the Almighty before engaging in public business have always, as the Marsh Court so carefully explained, been part of our Nation's history. The Town Council of Great Falls remains free to engage in such invocations prior to Council meetings. The opportunity to do so may provide a source of strength to believers, and a time of quiet reflection for all.

Id. at 302.

The court proceeded to strike down a town's practice of opening city council meetings with prayers that ended with supplications like, "in Christ's name we pray." Id. Councilor Turner narrowly interprets Wynne as barring only frequent references to Jesus Christ to the exclusion of all other deities. He urges this Court to sanction isolated references to Jesus Christ in accordance with his narrow reading of Wynne. Councilor Turner's adaptation of Wynne, would render the Establishment Clause inapplicable as long as a legislative prayer did not exceed a certain unspecified number or percentage of prayers. Despite his suggestion, Wynne does not direct this Court to conduct a quantitative analysis of the number and percentage of references to a specific deity. The Wynne court concluded that the Christian prayers at issue violated the rule of Marsh and Allegheny, by "affiliating" the government with the Christian religion. Id. at 300. Wynne did not restrict the number of invocations, rather it "enjoin[ed] the Town Council from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council Meetings." 376 F.3d at 302.

Wynne's holding, that the Establishment Clause prohibits sectarian legislative prayers, was reaffirmed by the Fourth Circuit in Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276 (4th Cir.2005). In Simpson, the court held that a local school board's nonsectarian prayers were permissible under Marsh and Allegheny, because the board's policy of inviting local clergy did not proselytize or advance any one, or disparage any

other, faith or belief.[1] Councilor Turner's invocations of the name of Jesus Christ, whether they are sporadic or frequent violates the prohibition against sectarian legislative prayer.

2. The City Council's policy does not violate the Establishment Clause.

Plaintiff claims that in adopting a nonsectarian prayer policy, the City Council violated the Establishment Clause by attempting to "prescribe or proscribe the content of official prayers." Plaintiff's theory that the City Council violated the Establishment Clause contradicts the Fourth Circuit in Wynne, which affirmed an order enjoining the town council's practice of invoking names associated with the Christian faith at council meetings. Under Plaintiff's theory, the Fourth Circuit itself violated the Establishment Clause by allegedly prescribing the content of the prayers rather than find the sectarian prayer in violation of the Establishment Clause. This is an impracticable and inaccurate result.

Plaintiff relies on the Supreme Court's holding in Lee v. Weisman, for the proposition that government officials may not prescribe or proscribe the content of official prayers, even when motivated

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[1] Plaintiff seeks to distinguish Simpson by stating the Plaintiff in Simpson, a Wiccan leader was outside of the protected class. However, in Simpson, all of the prayers at issue were given by religious leaders, as opposed to government officials at a local government meeting. Yet the Fourth Circuit still considered the speech government speech and subject to the restrictions of the Establishment Clause.

by an effort to ensure that such prayers are nonsectarian. 505 U.S. 577 (1992). Plaintiff's reliance on Lee impermissibly broadens its scope. Lee involved government-sponsored prayer at a high school graduation. In Lee, a high school invited a rabbi to give a prayer, but advised him that his prayers should be nonsectarian. The Court held that such school sponsored prayers were impermissible, whether sectarian or nonsectarian. Id. at 588-90.The decision was restricted to the school prayer context, in which government sponsored prayers are not permitted. The Lee Court refused to apply the rule of Marsh, to school prayer because of "[i]nherent differences between the public school system and a session of a state legislature." Id. at 596. The City Council, unlike the public high school at issue in Lee, has both the right to offer opening prayers, and the obligation to ensure that the prayers are nonsectarian. See Snyder v. Murray, 159 F.3d 1227, 1234 (10th Cir.1998) (stating a legislative body may reject an opening prayer that "falls outside the long-accepted genre of legislative prayer" as defined by Marsh); N. Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1149 (4th Cir.1991) (holding for purposes of the Establishment Clause, legislative prayer is to be distinguished from such other forms of prayer as court prayer and school prayer that may be per se unconstitutional).

Like Councilman Turner, the Plaintiff in Simpson v. Chesterfield County Bd. of Supervisors, alleged that by denying her request to deliver the opening prayer at a meeting of the Board of Supervisors, the County had violated the Establishment Clause, the Free Exercise and Free

Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. 404 F.3d 276, 287-88 (4th Cir.2005). The court in Simpson determined that the County had not violated the Establishment Clause in excluding Plaintiff from its list of persons permitted to deliver prayers. Therefore, the court held the "standards for challenges to government speech ... require that [plaintiff's] other claims must be rejected." Id. at 288. Similarly, since Councilor Turner's prayer is government speech, his First and Fourteenth Amendment claims are rejected.

IV.

For the foregoing reasons, the Court grants Defendants' Motion for Summary Judgment and dismisses Councilor Turner's Complaint. The Court hereby denies Plaintiff's Cross-Motion for Summary Judgment. An appropriate Order shall issue.

EXCERPTS OF PROCEEDINGS FROM FREDERICKSBURG, VIRGINIA CITY COUNCIL MEETING NOVEMBER 8, 2005

TRANSCRIBED FROM VIDEOTAPE BY KATHLEEN L. HNATT, RPR JANUARY 4, 2006

APPEARANCES PER NOVEMBER 8, 2005 MINUTES:

PRESENT: Mayor Thomas J. Tomzak, presiding, Vice Mayor William C. Withers, Jr.

Councilors Deborah L. Girvan, Thomas P. Fortune, Hashmel C. Turner, Jr.,

Matthew J. Kelly, and Kerry P. Devine.

ALSO PRESENT: City Manager Phillip L. Rodenberg, City Attorney Kathleen A.

Dooley, Building and Development Services Director T. Michael Naggs,

Planning and Community Development Director Raymond P. Ocel, Jr.,

Budget Analyst Mark Whitley, and Clerk of Council Deborah H. Naggs.

The Council of the City of Fredericksburg, Virginia, met in regular session on Tuesday,

November 8, 2005, beginning at 7:30 p.m. in the Council Chambers of City hall.

(The following is an excerpt from the beginning of the City Council meeting:)

THE MAYOR: I'd like to call the November 8th, 2005 regular session of the Fredericksburg City Council to order. We'll be led in prayer tonight by Counselor Matthew Kelly, and tonight we'll be led in the Pledge of Allegiance by Mr. Frank Brooks.

COUNCILOR MATTHEW KELLY: Most merciful Father, watch over our family, friends and neighbors. We would ask that you bring hope to those in despair, bring peace to those in distress, and comfort to those in pain. Watch over and protect our men and women in uniform who are serving our nation and protecting our freedoms both home and abroad. Let us not forget that we are here to serve not be served, and we ask your help in making decisions that benefit the entire Fredericksburg community. Amen.

. . . . . .

(The following is an excerpt from a subsequent proceeding during the City Council meeting:)

THE MAYOR: Item 1C, prayer rotation. Reverend Turner?

REVEREND TURNER: Thank you, Mr. Mayor. It's been a long time coming and as I asked

this evening about the prayer and you had someone already assigned on the rotation to lead this afternoon, but I do desire wholeheartedly to be added back to the rotating prayer roster, and it is my desire to be able to lead in our next council meeting on November the 22nd.

THE MAYOR: Thank you, Reverend Turner.

. . . . . .

(The following is an excerpt from a subsequent proceeding during the City Council meeting:)

THE MAYOR: Item 20, transmittal of remittal on council prayer.

MS. KATHLEEN DOOLEY: Yes. Mr. Mayor, this is simply a transmittal of the memo. I think it speaks for itself. If council members have questions about it or if council would like further discussion, I'm available. I would suggest that we schedule – if more discussion is required, I would suggest that we schedule either a work session or a closed session for that. Other than that, I think it's pretty plain on its face.

. . . . . .

(The following is an excerpt from a subsequent proceeding during the City Council meeting:)

THE MAYOR: Mr. Withers?

MR. WITHERS: All right. If the motion is appropriate, I'd like to make a motion that we accept the City Attorney's recommendation that council continue to offer nondenominational prayers seeking God's blessing on the governing body and his assistance in governing works of the city as party of its official meeting. I'd like to make that formal motion.

UNIDENTIFIED PERSON: I'll second that.

THE MAYOR: Reverend Turner?

REVEREND TURNER: Yes. Mr. Mayor, I will recluse (sic) myself from voting on that because it's pretty much directed toward an action that I requested, so I voice my opinion on the matter in previous setting so I will not be voting on this.

THE MAYOR: We have a motion to accept the City Attorney's memo on council prayer. It has been seconded, and this motion will be council policy if passed. Is there any further discussion?

MR. KELLY: One last comment. Mr. Mayor, I have followed the rules on this and will continue to do so when I have the prayer duty but, again, I've kind of voiced my issue on this thing regarding – you know, nobody has yet explained to me why somebody who believes as they do and ask that individual, whoever it may be, to bless the entire city, everybody in the city regardless of who they are is a bad thing. So for philosophical reasons, I'm going to vote against this motion, but

understand that if I continue to do my prayer duty and I will continue in rotation, I will follow the letter of this. But philosophically, I've still got some issues with it.

MR. WITHERS: May I comment?

MR. MAYOR: Yes, sir.

MR. WITHERS: You know, you spoke quite eloquently tonight about a need to do things. I think based on the Attorney's recommendation, I think we should all understand why we need to pass this, to keep us out of a legal battle that we just don't need to be in.

MR. KELLY: And I understand, Billy, but, again, I think it will pass and I know it will and that's why – again, I'm not going to do anything to get us – I will continue when I do my prayer to pretty much do the prayer I do, make it nondenominational, but I do have a bit of a philosophical issue with this.

MR. WITHERS: I have some too, but it doesn't rise above what we ought to do for the public.

THE MAYOR: Reverend Turner?

REVEREND TURNER: Yes. Mr. Mayor, to try to clear it up, I'm just referring back to my free speech rights, so that is the reason why I've requested to be put back in the prayer rotation. I feel that it's a right that all of us as council members have if we desire to be in the rotation roster, so that

was the reason why I made that request. It's just a matter of my free speech and the way that I believe is acceptable.

THE MAYOR: Ms. Girvan?

MS. GIRVAN: Thank you, Mr. Mayor. I am going to support this memo only because I agree with the City Attorney's caution in that we not be the front-runners in litigation to prove our points here. However, I will say that we are individuals serving on this council and when we open with prayer we are praying as individuals, not on behalf of the entire council. That's the way I see it. We each bring our own backgrounds and influence and experience and personal beliefs to this council and it does effect decisions that we make on behalf of the citizens. So I do want to acknowledge Reverend Turner's position because I think he's standing by his principles and I support that. I am supporting the memo for practical reasons because that's the policy that we've been undertaking thus far, but I'm hoping that in the near future this will be resolved in the courts or somehow legally so that we can open our meetings as we so choose. Thank you.

THE MAYOR: Thank you, Ms. Girvan. Any more discussion? There is a motion on the floor to accept the City Manager's recommendation. It's been seconded. If no further discussion, please cast your votes.

(Whereupon, the video shows five votes in favor and one against.)

THE MAYOR: Anything else, Ms. City Attorney?

MS. DOOLEY: No.

THE MAYOR: Okay. If there's no further business, if there's no objection, we will adjourn.

Item # 20

TO: City Council
FROM: Kathleen Dooley, City Attorney
DATE: November 4, 2005
RE: Prayer at Council Meetings

ISSUE:

You have asked me to research the issue of whether Council members may offer a prayer to Jesus Christ during the official prayer with which they begin Council meetings. If it is not advisable to do so, you have asked whether the Council has other options for accommodating those Council members and members of the community who feel that such a prayer would be appropriate and desirable.

RECOMMENDATION:

I recommend that Council continue its current practice of offering the official prayer to a non-denominational "God," without invoking the name of a specifically Christian (or other denominational) deity.

The Virginia General Assembly adopted legislation in the 2005 session expressly authorizing local governing bodies to permit denominational prayer prior to the official call to order. Culpeper County Board of Supervisors and the Town Council for Manassas have both put this authority into practice, and you may wish to consider doing the same.

BACKGROUND:

Council has opened its meetings with a prayer for many years. In 2004, a Fredericksburg citizen objected to the then-common practice of closing a prayer with the phrase, "In Jesus' name we pray." The Federal Fourth Circuit Court of Appeals had recently decided the case of *Wynne v. Town of Great Falls*, and there was a great deal of public interest in the issues. Since that time, Council has continued to open its meetings with a non-denominational prayer.

Meanwhile, the question of the appropriate role of religion in official public life has continued to engage both the public and the federal courts. In particular, the Fourth Circuit upheld the Chesterfield County, Virginia practice of permitting non-denominational prayers in the Judeo-Christian tradition. (The United States Supreme Court declined to hear the appeal of this decision.) The County's policy excluded a Wiccan from offering the official prayer. Next, the United States Supreme Court issued two opinions, one upholding and the other prohibiting the display of the Ten Commandments in public spaces. Finally, Cobb County, Georgia, is now in federal court over the issue of a Christian prayer during the meeting of its governing body.

The response of the Virginia General Assembly was to enact House Bill 2615 of the 2005 session, which is codified at Code of Virginia, 1950, as amended, section 15.2-1416.1. This new law states:

> "During the time prior to the governing body's

> actual call to order or convening of business, any expressions by members of the governing body or members of the public shall be held consistent with the individual's First Amendment right of freedom of speech."

Our neighbors Culpeper County and the Town of Culpeper have both pursued practices under the new legislation. Neither jurisdiction has adopted an official policy with respect to the new practice. In both jurisdictions, a local minister prays for the governing body prior to the call to order of the meeting. The minister may offer a denominational or non-denominational prayer. Both jurisdictions have removed the official prayer from their meeting agendas.

CONCLUSION:

Based on the above, and based upon the conversations that I have had either formally or informally with members of Council, I would recommend the following:

1. Council is free to permit the use of the Council chambers immediately (say five or ten minutes) prior to the call to order of the meeting for private prayer, just as any number of private conversations currently take place in the Chambers prior to the commencement of the meeting. The private

prayer could be offered by a member of Council or a member of the clergy. The private prayer could be offered in an expressly denominational (Christian) tradition. The prayer could be carried out amongst a small (or large) group of people who may gather together prior to the start of the meeting.

I would recommend that Council members who wish to participate in the prayer join the group in the public meeting area of the Chambers. The person offering the prayer should do so without benefit of the podium or microphone. Council members and members of the public would be free to gather, as they wish, with the prayer-giver, and to stand or sit again as they wish, during the prayer.

2. Council may continue to offer a non-denominational prayer, seeking God's blessing on the governing body and His assistance in conducting the work of the City, as part of its official meeting. At this time, there is no clear legal authority to permit a denominational prayer – one invoking Jesus Christ, for example – as part of the official meeting.

This issue will continue to be litigated through the federal court system. We will all watch with interest the continued development of additional First Amendment doctrine through the course of litigation and public debate.

Please contact me if you have additional questions.

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No. 08-518

Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Petitioner Hashmel C. Turner, Jr., pursuant to Rule 15 of the Rules of the Supreme Court, files this supplemental brief to alert the Court to the recent decision of the United States Court of Appeals for the Eleventh Circuit in Pelphrey v. Cobb County, Georgia, No. 07-13611, 2008 WL 4710693 (11th Cir. Oct. 28, 2008). In Pelphrey, certain taxpayers sued the County Commission and the Planning Commission of Cobb County, Georgia, alleging that these governing bodies violated the Establishment Clause by permitting clergy who offered legislative prayers at Commission meetings to include references to deities, including Jesus Christ, in their prayers. The district court ruled that the prayers (for the most part) did not violate the Establishment Clause, and the Eleventh Circuit affirmed.

This decision matters for two reasons: 1) The Eleventh Circuit has created a circuit split, because, in stark contrast to the Fourth Circuit's holding in this case, the Eleventh Circuit acknowledged that the decision in Lee v. Weisman, 505 U.S. 577 (1992), and specifically that portion of Lee holding that it is no business of government to compose official prayers, applies in the legislative prayer context; and 2) The Eleventh Circuit recognized, in effect, that a policy attempting to differentiate between "sectarian" and "nonsectarian" prayer – or, in this case, "denominational" and "nondenominational" prayer – is a futile (and unconstitutional) task, a conclusion the Fourth Circuit completely sidestepped in the decision below by creating the artificial (and

misguided) construct that legislative prayer is government speech.

1. The Eleventh Circuit Recognized that Lee v. Weisman Applies in the Legislative Prayer Context.

Turner argued at the Fourth Circuit that the City Council's prayer policy mandating "nondenominational" prayers violated the Establishment Clause because this Court held in Lee v. Weisman that the government may not prescribe or proscribe the content of an official prayer. The Fourth Circuit, however, rejected Turner's argument and refused to apply Lee because it held that Lee is limited to the school prayer context and does not apply to legislative prayer.

The Eleventh Circuit disagrees. In Pelphrey, the court extensively discusses this Court's ruling in Lee v. Weisman and asserts that, along with Marsh v. Chambers, 463 U.S. 783 (1983), it represents, in effect, controlling authority for courts analyzing the constitutionality of legislative prayer policies. Pelphrey, p. 14 ("Marsh, as informed by Allegheny and Lee, controls our review of the constitutionality of legislative prayers.")[1] The Eleventh Circuit specifically quoted Lee for the following principle: "It is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by

[1] Citations are to the pages of the Eleventh Circuit's slip opinion.

government.'" Id. (citations omitted). The Eleventh Circuit also recognized, contrary to the rationale for the City's policy and the Fourth Circuit's implicit ruling below, that:

> To read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer "is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one . . . faith or belief." Id. at 794–95, 103 S. Ct. at 3337–38. . . . The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they are wrong.

Pelphrey, p. 15-16.[2]

If the Fourth Circuit had followed the same approach, it likely would have concluded that the City Council's prayer policy – which *prescribes* "nondenominational" prayer and, in effect and as applied, *proscribes* any references to Jesus Christ – violates the Establishment Clause. It did not so hold, however, and now there exists a clear split between these two circuits on the proper analytical

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[2] The Eleventh Circuit also held that, under the Establishment Clause, government cannot purposefully discriminate among religious beliefs in the selection of persons giving prayers. Pelphrey, p. 40. In the present case, the Fourth Circuit upheld the application of a policy purposefully adopted and applied to exclude Councilor Turner from praying based on his beliefs.

role of this Court's decision in Lee v. Weisman and, more specifically, whether the rule announced in Lee even applies in the legislative prayer context. Given the fundamental – indeed "cornerstone" – Establishment Clause principles announced in Lee, this split represents a significant development in legislative prayer jurisprudence. See Pelphrey, p. 33 ("The federal judiciary has no business 'in compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government ....'") (quoting Lee v. Weisman, 505 U.S. at 588).

In addition to the reasons set forth in Turner's petition, the Court should grant review to resolve this circuit split.

2. The Eleventh Circuit Recognized that Deciding Where to Draw the Line Between Sectarian and Nonsectarian Prayer is Virtually Impossible.

Turner also argued at the Fourth Circuit that the City Council's "nondenominational" prayer policy is unconstitutionally vague and overbroad. The Fourth Circuit did not address this portion of his argument because it concluded, erroneously, that legislative prayer is "government speech."

While the Eleventh Circuit did not have occasion to engage the "government speech" debate, it did address the monumentally difficult task faced by government officials trying to determine whether a prayer contains sectarian references. Here is what

the Eleventh Circuit said about the capacity of government to decide essentially theological issues:

> We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard. Even the individual taxpayers cannot agree on which expressions are "sectarian." Bats, one of the taxpayers, testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another taxpayer, testified, "[Y]ou can't say Jesus, . . . Jehovah, . . . [or] Wicca . . . ." Selman also deemed "lord or father" impermissible. The taxpayers' counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. ... The difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard. As the taxpayers' counsel conceded at oral arguments, "the line is not completely bright between sectarian and nonsectarian."

Pelphrey, pp. 16 – 18. The Fourth Circuit's decision, however, gives legislative bodies license to undertake the precise line drawing that the Eleventh Circuit found so difficult to accomplish. And it did so by holding that legislative prayer is "government speech," an unprecedented construct never before recognized by this Court.

In addition to the reasons set forth in Turner's petition, this Court should grant review to address the standardless discretion and inappropriate government entanglement with religion inherent in the City Council's "nondenominational" prayer policy, which is unconstitutionally vague and overbroad.

CONCLUSION

For these reasons and those set forth in Turner's original petition, the Court should grant review and reverse the Fourth Circuit's decision below.

Respectfully submitted,

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No. 08-518

IN THE

Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF FREDERICKSBURG, VIRGINIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

In an opinion authored by Justice Sandra Day O'Connor, sitting by designation, the Court of Appeals below applied settled precedent concerning legislative prayer to allow the City Council of Fredericksburg, Virginia ("City Council") to control its own government speech. Specifically, the Fourth Circuit held that the City Council acted permissibly when it determined that the official invocations with which it opened its meetings would remain nonsectarian, thereby complying with this Court's admonition that such prayers neither "proselytize or advance any one, or disparage any other, particular faith or belief." *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) (allowing legislative prayer). The Fourth Circuit recognized that as government speech, the City Council's opening prayers were not subject to the individual protections of the Free Speech and Free Exercise Clauses. And because the Council's policy governing invocations followed the rule of *Marsh*, it complied with the Establishment Clause.

Relying largely on case law having nothing to do with legislative prayer, Councilor Turner claims that the Fourth Circuit got it wrong. Indeed, Councilor Turner claims that this case involves "unique and important" questions of First Amendment law, that the result below is "unprecedented" and "has already triggered a discriminatory backlash," and that Justice O'Connor's opinion "threaten[s] to undermine free speech rights around the country." Petition for Writ of Certiorari ("Turner's Pet."), at 1, 2 (Oct. 20, 2008). In a supplemental petition, Councilor Turner claims further that a recent decision of the United States Court of

Appeals for the Eleventh Circuit has created a circuit split.

Councilor Turner is mistaken on all counts. There is no basis for his exaggerated language and no reason for this Court to grant his Petition.

First, the Fourth Circuit below applied settled law holding that legislative prayer such as that offered by the City Council is government speech. Far from being "unprecedented," *see* Turner's Pet., at 2, every case that has ever considered legislative prayer has reached this same conclusion. Indeed, as Justice O'Connor recognized in her opinion below, "[Councilor] Turner has not cited a single case in which a legislative prayer was treated as individual or private speech." (Appendix to Turner's Pet. ("Turner's App."), p. A-6).

Second, the Fourth Circuit below applied settled law holding that "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995). The individual protections of the Free Speech and Free Exercise Clauses do not apply to the government's own speech. Accordingly, the City Council was entitled to determine that when it spoke through legislative prayers — a practice allowed by this Court in *Marsh* — it would refrain from potentially polarizing sectarian references.

Finally, the recent decision of the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008), has not created a circuit split. Indeed, the Eleventh Circuit itself denied

that its decision was contrary to the Fourth Circuit's decision below, a denial that Councilor Turner conveniently omits from his Supplemental Brief. *See Pelphrey*, at *9 (noting that "Justice Sandra Day O'Connor, writing for the Fourth Circuit [in *Turner*], . . . *applied the same standard from Marsh that we apply today*") (emphasis added).

In conclusion, Councilor Turner's Petition is long on hyperbole and short on accurate legal analysis. This Court should deny Councilor Turner's Petition.

STATEMENT OF THE CASE

The City of Fredericksburg, Virginia, is governed by the City Council, which consists of seven elected members. (Turner's App., p. A-12). The City Council holds public meetings every two weeks to conduct its business. *Id.* The Mayor presides over these meetings. *Id.*

The City Council begins each of its meetings with a "Call to Order." *Id.* After the call to order, the Mayor recognizes a Council member to deliver the City Council's opening prayer. *Id.* The Council member delivering the prayer at any given meeting is selected from a list of Council members who have placed their name on the Council's prayer rotation. *Id.*

Members of the public are asked to stand for the opening prayer. *Id.* After standing, many "close their eyes and bow their heads" while the Council member recognized by the Mayor delivers the Council's prayer. *Id.* Following the opening prayer, everyone in the City Council chambers remains standing and recites the Pledge of Allegiance. *Id.*

This order of events is memorialized in the City Council's official printed meeting agendas. *Id.* These agendas include "Prayer" as an official agenda item, after the "Call to Order" and immediately before the "Pledge of Allegiance." *Id.*

A. *Councilor Turner Assumes a Seat on the City Council*

From their beginning in 1957 to 2002, there is no indication that the City Council's opening prayers had ever been sectarian. This changed when Councilor Turner assumed a seat on the City Council in 2002 and placed his name in the prayer rotation. *Id.* When it was Councilor Turner's turn to deliver the Council's opening prayer, he concluded it with phrases such as "in Jesus' holy name we pray," *see* Appendix, p. 4a, and "in the name of Jesus Christ, we thank you for what you are going to do." *Id.* at p. 5a. Indeed, on April 8, 2003, after being recognized by the Mayor to deliver the Council's opening prayer, Councilor Turner assumed the role of a government-sponsored minister, stating:

> Mayor, our City Council, before I go in prayer, *I would like to make a request to all that are here and those that are out there in TV land.* I believe that our land is in need of much prayer, and we would invite all of you that know the word of prayer, that know there is a God that created this universe . . . and answers prayers, we would ask that whether you are seated or whether you are standing tonight, that if you would go to God in prayer. . . .

> [W]e need to go to God in prayer. And I believe that He would hear and answer each and every one of our prayers.

Id. at p. 1a (emphasis added). Following this prologue, Councilor Turner delivered a prayer that concluded with: "Forgive us all for our sins, lead, guide and direct us is our prayer in Jesus' name." *Id.* at p. 2a (emphasis added). Several months later, upon his next opportunity to deliver the City Council's opening prayer, Councilor Turner prayed: "Must Jesus bear the cross alone and all the world go free. No there's a cross for everyone and, surely, there's a cross for me. . . . Lord, we ask these blessings in Jesus' name." *Id.* at pp. 7a-8a.

Following objections by the ACLU to Councilor Turner's prayers, in November 2005, the City Council adopted a policy regulating its own speech. Specifically, the policy required the City Council to "continue its current practice of offering the official [opening] prayer to a non-denominational 'God,' without invoking the name of a specifically Christian (or other denominational) deity." Turner's App., p. A-13. Councilor Turner abstained from the vote on this policy. *Id.*

Following the adoption of this policy, the Mayor asked Councilor Turner if he "would continue to invoke the name of Jesus Christ" when he delivered the Council's opening prayers. *Id.* at p. A-14. Councilor Turner insisted that he would. *Id.* As a result, at the City Council meeting on November 22, 2005, the Mayor did not recognize Councilor Turner to give the Council's opening prayer, as Councilor Turner had been scheduled to do. *Id.*

B. *Councilor Turner Sues the City Council and the Mayor*

On January 10, 2006, Councilor Turner filed this suit against the City Council and the Mayor of the City of Fredericksburg, Dr. Thomas J. Tomzak. Councilor Turner claimed that the City Council's prayer policy violated his alleged right to deliver official City Council prayers in the name of Jesus Christ. Councilor Turner asserted claims under the First, Fifth and Fourteenth Amendments to the United States Constitution, various provisions of the Virginia Constitution, and various federal and state statutes.

On cross-motions for summary judgment, the district court granted defendants' motion and dismissed Councilor Turner's Complaint. (Turner's App., pp. A-11 - A-23). The district court held that the official opening prayers of the City Council were government speech. (Turner's App., pp. A-15 - A-17). Because the prayers were government speech, the "First Amendment guarantees with respect to free expression and exercise of religion" — guarantees that apply only to private speech — "[we]re not implicated." (Turner's App., p. A-16). Rather, the district court recognized, the City Council's speech was "subject only to the proscriptions of the Establishment Clause," *see* Turner's App., p. A.18, proscriptions that the policy satisfied.

On appeal, in an opinion by Justice Sandra Day O'Connor, the Fourth Circuit affirmed the decision of the district court. *Turner v. City Council of the City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008), *included in* Turner's App., pp. A-1 - A-10. The Fourth

Circuit held that "[b]ecause the prayers at issue here are government speech, . . . Fredericksburg's prayer policy does not violate Turner's Free Speech and Free Exercise rights." (Turner's App., p. A-3).

In reaching this conclusion, the Fourth Circuit first considered whether the City Council's opening prayers were "speech that must be attributed to the government, or whether the . . . prayers were given in a personal capacity." (Turner's App., p. A-4). The court noted that Councilor Turner "ha[d] not cited a single case in which a legislative prayer was treated as individual or private speech." (Turner's App., p. A-6). The court noted further that the facts of this case — in which the opening prayers were "an official part of every Council meeting," the prayer-givers were "allowed to speak only by virtue of [their] role as a Council member," and the prayers were "clearly serving a government purpose" — compelled the conclusion that the prayers were government speech. (Turner's App., pp. A-5 - A-6).

The Fourth Circuit then considered whether the City Council's prayer policy violated Councilor Turner's Free Speech and Free Exercise rights. As Justice O'Connor noted, "[t]his issue turns on the characterization of the invocation as government speech." Turner's App., at p. A-9 (quoting *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005)). When the government is "the speaker," it may "regulate the content of what is or is not expressed." Turner's App., at p. A-10 (quoting *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995)). Because the City Council's prayers were government speech, Councilor Turner's "First Amendment and Free

Exercise rights ha[d] not been violated." Turner's App., at A-10.

Finally, the Fourth Circuit considered whether the City Council's prayer policy itself violated the Establishment Clause. Relying on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Fourth Circuit held that it did not. Rather, "[t]he Council's decision to provide only nonsectarian legislative prayers place[d] it squarely within the range of conduct permitted by *Marsh*." Turner's App., at p. A-9.

Justice O'Connor noted expressly that the Fourth Circuit was *not* deciding whether a nonsectarian prayer policy was *required* by the Establishment Clause; that is, it was not deciding whether Councilor Turner's prayers in the name of Jesus Christ were constitutionally permissible absent any Council policy. Rather, the court held only that the City Council's nonsectarian prayer policy was an acceptable regulation of the Council's own speech. *See* Turner's App., p. A-8 ("We need not decide whether the Establishment Clause *compelled* the Council to adopt their [nonsectarian] legislative prayer policy . . . .").[1]

---

[1] Defendants note that there is no support in the record, and Councilor Turner cites none, for Councilor Turner's claims that the decision below "has already triggered a discriminatory backlash against state-trooper chaplains in Virginia." Turner's Pet., at 1.

REASONS FOR DENYING THE PETITION

This Court should deny Councilor Turner's Petition. This case presents no "unique and important questions," *see* Turner's Pet., at 11, and most certainly does not "threaten[] to sweep an entire category of individual free speech rights out of the constitution." *Id.* at 12. Rather, the Fourth Circuit below applied settled precedent in holding that the City Council, a government body, could regulate its own speech. No court has held otherwise. Accordingly, there is no circuit split on this issue and no other factors weighing in favor of this Court's intervention. *Cf.* Sup. Ct. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons.").

I. *The Fourth Circuit Properly Applied this Court's Precedents and Held that the City Council, a Government Body, Could Regulate Its Own Speech*

A. *The Fourth Circuit Held Correctly that the City Council's Official Opening Prayers Are Government Speech*

The Fourth Circuit held correctly that the City Council's official opening prayers are government speech. Notwithstanding Councilor Turner's efforts to confuse this issue, *see* Turner's Pet., at 12, 14-17, this is not a novel or open question. Every court that has ever considered legislative prayer, including this Court, has treated such prayer as "government speech, 'subject only to the proscriptions of the Establishment Clause.'" *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) (Wilkinson, J.), *cert. denied*

546 U.S. 937 (2005). Justice O'Connor recognized this below, noting that "[Councilor] Turner ha[d] not cited a single case in which a legislative prayer was treated as individual or private speech." (Turner's App., p. A-6).

In light of this monolithic authority, Councilor Turner's claim that the Fourth Circuit's decision on this point was "unprecedented," *see* Turner's App., at A-2, is preposterous.

This Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), is instructive. The plaintiff in *Marsh* challenged the opening prayers of the Nebraska state legislature. This Court did not analyze the constitutionality of those prayers under the Free Speech and Free Exercise Clauses, as it would have done if the speech in question had been private. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (noting that "private speech endorsing religion [is protected by] the Free Speech and Free Exercise Clauses") (quoting *Bd. of Educ. of Westside County Sch. v. Mergens*, 496 U.S. 226, 250 (1990)). Rather, this Court defined the issue as whether the challenged legislative prayers "violate[d] the [E]stablishment [C]lause," *Marsh*, 463 U.S. at 784, a clause that applies only to speech by (or endorsed by) the government. *See Santa Fe*, 530 U.S. at 302 (the "Establishment Clause forbids . . . *government* speech endorsing religion") (quoting *Mergens*, 496 U.S. at 250).

No case has ever deviated from the approach of *Marsh* and applied a free speech or free exercise analysis to legislative prayer. *See, e.g., Pelphrey v. Cobb County*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008) (applying Establishment Clause to opening

prayers of county commissions); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (applying Establishment Clause to opening prayers of Indiana state legislature); *Simpson*, 404 F.3d at 288 (opening prayers of a local government body are "government speech, 'subject only to the proscriptions of the Establishment Clause'") (quoting *Rosenberger*, 515 U.S. at 820); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (applying Establishment Clause to opening prayers of town council), *cert. denied*, 545 U.S. 1152 (2005); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (applying Establishment Clause to opening prayers of city council); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (in unpublished decision, applying Establishment Clause to opening prayers of school board); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867 (Cal. Ct. App. 2002) (applying Establishment Clause to opening prayers of city council).

To hold that this case involves anything other than government speech would strain credulity. The City Council's opening prayers are exactly that — the *City Council's* opening prayers. They are offered on the City Council's behalf by an elected councilor after the Mayor calls the meeting to order and recognizes that elected official to deliver the City Council's prayer. *See supra*, at 3. Members of the public are asked to and do stand for the prayer, which is followed immediately by the Pledge of Allegiance. *See supra*, at 3. Only by turning a blind eye to these facts could one characterize these officially sanctioned prayers, delivered only by government officials in their capacity as such, as private speech entitled to protection under the Free Speech and Free Exercise Clauses.

Councilor Turner attempts to support his "private speech" argument by claiming that this Court's "government speech doctrine" has had a "relatively short lifespan," *see* Turner's Pet., at 14, and is thus evolving and open for debate. This argument is disingenuous. The "doctrine" to which Councilor Turner refers has nothing to do with legislative prayer, which occupies a unique niche in Establishment Clause jurisprudence. *See Simpson*, 404 F.3d at 281 (the decision in *Marsh* "has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines"); *Snyder*, 159 F.3d at 1232 ("the mainline body of Establishment Clause case law provides little guidance for our decision in this case [involving legislative prayer]. Our decision, instead, depends on our interpretation of the holding in *Marsh*."). Indeed, the "doctrine" Councilor Turner cites has nothing to do with the Establishment Clause at all. Rather, it is essentially the federal government's defense to claims that it is using public money to compel speech in violation of the First Amendment. *See, e.g.*, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (advertising funded by targeted government assessment on beef producers was government speech, and thus not subject to a First Amendment challenge as a compelled subsidy).

In sum, the Fourth Circuit's conclusion that the City Council's opening prayers are government speech is supported both by common sense and by the unanimous case law addressing legislative prayer, including this Court's decision in *Marsh*.

B. *The Fourth Circuit Held Correctly that Because the City Council's Official Opening Prayers Are Government Speech, Councilor Turner's Free Speech and Free Exercise Challenges Fail*

Councilor Turner conceded in the district court that if the City Council's opening prayers are government speech, his challenges under the Free Speech and Free Exercise Clauses fail. *See* Turner's Consol. Mem. in Support of Plaintiff's Mot. for Summary Judgment and in Opp. to Defendants' Mot. for Summary Judgment, at 15 (June 23, 2006) (conceding that "an individual free speech analysis is inapposite in the government speech arena"). Although he now argues a different view, *see* Turner's Pet., at 20-21, Councilor Turner's initial concession was correct. As this Court has recognized, "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995); *see also, e.g.*, *Simpson*, 404 F.3d at 288 ("government speech [is] subject only to the proscriptions of the Establishment Clause") (citing *Rosenberger*).

As the City Council's opening prayers are government speech, Councilor Turner's claim that the City Council infringed upon his rights of free speech and free exercise in a manner that cannot withstand "strict scrutiny," *see* Turner's Pet., at 18-21, is misplaced. There are no such rights with respect to government speech. *See, e.g.*, *Simpson*, 404 F.3d at 287-88 (rejecting plaintiff's claim that county board's refusal to allow her to deliver its opening prayer violated her First Amendment rights). Put simply, "[n]o individual has a

First Amendment right to offer an *official* prayer reflecting his *personal* religious beliefs." *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 750 (S.D. Ind. 2006).

Councilor Turner's repeated references to a "forum" analysis fail for similar reasons. By invoking the term "forum," Councilor Turner refers to this Court's distinction in cases under the Free Speech Clause between the various venues in which private speech can occur. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (referring to "the traditional public forum, the public forum created by government designation, and the nonpublic forum") (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). A "forum" analysis, however, has nothing to do with legislative prayer, which is government speech. Rather, this Court "adopted a forum analysis as a means of determining when the [g]overnment's interest in limiting the use of its property . . . outweighs the interest of those" — i.e., those *outside* of the government — "wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800; *see also Goulart v. Meadows*, 345 F.3d 239, 248 (4th Cir. 2003) ("The Supreme Court has adopted forum analysis as the means of analyzing restrictions placed on *private speech that occurs on government property*.") (emphasis added). This explains why no case involving legislative prayer engages in the "forum" analysis that falsely anchors Councilor Turner's petition.

Nor can Councilor Turner rely on the "vagueness" and "overbreadth" doctrines. *See* Turner's Pet., at 24-28. Those doctrines apply to protect only the *private* "exercise of First Amendment rights." *City of Chicago*

v. Morales, 527 U.S. 41, 52 (1999); *see also Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (airport regulation was overbroad because it "prohibit[ed] . . . protected expression" under the First Amendment).

In sum, as Justice O'Connor recognized below, "because the prayers at issue here are government speech, . . . Fredericksburg's prayer policy does not violate [Councilor] Turner's Free Speech and Free Exercise rights." (Turner's App., p. A-3).

C. *Whether the Establishment Clause Requires Nonsectarian Legislative Prayer Is Not at Issue in this Case*

Councilor Turner asks this Court to grant certiorari and "acknowledge that the Establishment Clause does not require that legislative prayer extinguish the diversity of religious viewpoints in our country." Turner's Pet., at 30. But the decision below held no such thing. Although the City Council argued below — and still believes — that the Establishment Clause forbids sectarian legislative prayer, the Fourth Circuit did not address that issue. *See* Turner's App., at p. A-8 ("[w]e need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy" prohibiting sectarian references).

Rather, the Fourth Circuit below held simply that the Council, as a government body regulating its own speech, was *permitted* to adopt such a policy. *See* Turner's App., at A-9 ("The Council's decision to provide only nonsectarian legislative prayers places it

squarely within the range of conduct permitted by *Marsh* . . . ."); *see also Pelphrey*, 2008 WL 4710693, at *9 ("the Fourth Circuit [in *Turner*] expressly declined to hold that *Marsh* required a policy of nondenominational prayers") (citing *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008)). This holding makes sense. The City Council surely may determine how it will effectuate *Marsh's* admonition that legislative prayer may not "proselytize or advance any one, or disparage any other, particular faith or belief." *Marsh*, 463 U.S. at 794-95.

Councilor Turner, however, believes that the City Council lacked the authority to regulate its own speech and to determine how it would comply with the mandate of *Marsh*. He claims that the City Council's prayer policy violates the Establishment Clause because it attempts to "prescribe or proscribe the content of official prayers." Pet., at 21-24. Councilor Turner cites *Lee v. Weisman*, 505 U.S. 577 (1992), a case having nothing to do with legislative prayer, as the sole support for this argument. *See* Pet., at 21-24.

Councilor Turner, however, misunderstands the scope of *Lee*. The student-plaintiff in *Lee* argued that a school-sponsored prayer at a middle school graduation violated the Establishment Clause. *See Lee*, 505 U.S. at 580. In response to this argument — and in an effort to minimize any perceived violation of the Establishment Clause — the defendant school district noted that it had asked the invited clergy to deliver prayers that were strictly nonsectarian. *Id.* at 588-89.

This Court rejected the school district's argument. It held that school-sponsored prayers at a public school graduation were impermissible, whether sectarian or not. *Id.* at 588-90. In short, the decision in *Lee* applied to the school prayer context, in which *no* government-sponsored prayers are permissible.

In sharp contrast, this case involves the one context in which this Court has held that the Constitution *does* permit the government to sponsor prayer; namely, the context of a legislative invocation, as long as the government ensures that the invocation is not "exploited to proselytize or advance any one, or disparage any other, faith or belief." *See Marsh*, 463 U.S. at 794-95; *see also Lee*, 505 U.S. at 596-97 (refusing to apply the rule of *Marsh* to school prayer because of "[i]nherent differences between the public school system and a session of a state legislature"); *Simpson*, 404 F.3d at 281 ("*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines."). Given this Court's special treatment of legislative prayer, a legislative body has not only the right, but the *obligation* to regulate — or "prescribe" — the content of its official prayers. *Marsh* recognized this obligation when it held that there are limits on the allowable scope of legislative prayer. *Marsh*, 463 U.S. at 794; *see also Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) ("[w]hen a legislative body prevents its agents from reciting a prayer that falls outside this genre [of acceptable legislative invocations], the legislators are merely enforcing the principle[s] [adopted] in *Marsh*").

In conclusion, because the City Council's choice to offer nonsectarian legislative prayers does not violate the Establishment Clause, that choice is necessarily permissible. *See Simpson*, 404 F.3d at 288 (government speech is "subject only to the . . . Establishment Clause").

II. *There Is No Circuit Split*

As discussed above, the decision of the Fourth Circuit below accords with settled law concerning the government's ability to regulate its own speech in the legislative prayer context. Nonetheless, Councilor Turner claims in his Supplemental Brief ("Turner's Supp. Pet.") that there is in fact a "circuit split" on this issue. Turner's Supp. Pet., at 1. As support for this claim, he cites the recent decision of the United States Court of Appeals for the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*, __ F.3d __, 2008 WL 4710693 (11th Cir. Oct. 28, 2008), which he claims is directly contrary to the holding of the Fourth Circuit in *Turner*.

Once again, however, Councilor Turner is mistaken. As evidence, one needs only to consider the words of the *Pelphrey* court itself, which considered Justice O'Connor's opinion in *Turner* and found it to be perfectly consistent with its own analysis:

> This year, Justice Sandra Day O'Connor, writing for the Fourth Circuit, read *Marsh* to allow invocations offered during meetings of a city council. *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 356 (4th Cir. 2008). The city council permitted only nondenominational prayers at its meetings,

> and Turner, a member of the council who had not been allowed to offer a sectarian prayer, challenged that policy. *Id.* at 354. The Fourth Circuit upheld the policy *and applied the same standard from Marsh that we apply today*: "So long as the prayer is not used to advance a particular religion or to disparage another faith or belief, courts ought not to 'parse the content of a particular prayer.'" *Id.* at 356 (quoting *Marsh*, 463 U.S. at 795). . . .
>
> Although it upheld the policy of the council, the Fourth Circuit expressly declined to hold that *Marsh* required a policy of nondenominational prayers . . . As the Fourth Circuit recognized, *Marsh* permits a range of prayers to be offered during local, state, or federal legislative meetings.

Pelphrey, at *9.

Moreover, the decisions in *Pelphrey* and *Turner* involved different issues. Specifically, the plaintiffs in *Pelphrey* sued to stop legislative prayers that they deemed impermissibly sectarian. Faced with this claim, the Eleventh Circuit was forced to determine what sorts of legislative prayers impermissibly "proselytize or advance" religion, *Marsh*, 463 U.S. at 794, thereby violating the Establishment Clause. *See Pelphrey*, at *1 ("The taxpayers argue that the Establishment Clause permits only nonsectarian prayers for the meetings of the commissions, but we disagree.").

In contrast, this case is about the ability of a city council to control its own speech. The issue is not what the Establishment Clause requires with respect to the content of legislative prayer, as nobody has sued claiming that the Council's prayers impermissibly advanced religion. Rather, the issue is whether a city council can choose to deliver only prayers that are nonsectarian. As Justice O'Connor noted expressly below, the Fourth Circuit did not need to, and was not, deciding what the Establishment Clause required in terms of the content of a legislative prayer. *See* Turner's App., at p. A-8 ("We need not decide whether the Establishment Clause *compelled* the Council to adopt their legislative prayer policy, because the Establishment Clause does not absolutely dictate the form of legislative prayer.").

In sum, Councilor Turner's "circuit split," *see* Turner's Supp. Pet., at 1, is imaginary.

CONCLUSION

Contrary to Councilor Turner's hyperbole, nothing in the decision below is inconsistent with any decision of this Court or any other court of appeals. For this reason, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Date: November 20, 2008

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APPENDIX

APPENDIX — EXCERPTED TRANSCRIPT OF PROCEEDINGS

[commencing at page 25]

April 8, 2002

MAYOR BECK: Thank you all for being here. We will start the April 8, 2003, meeting of the Fredericksburg City Council. I will call that to order. And we will start with a prayer led by Reverend Hashmel Turner, followed by the Pledge of Allegiance.

HASHMEL C. TURNER, JR.: Mayor, our City Council, before I go in prayer, I would like to make a request to all that are here and those that are out there in TV land. I believe that our land is in need of much prayer, and we would invite all of you that know the word of prayer, that know that there is a God that created this universe that we live in that sets high and looks low and hears and answers prayers, we would ask that whether you are seated or whether you are standing tonight, that if you would go to God in prayer, because there is war and rumors of war in our land and a lot of violence, a lot of hatred and a lot of malice and a lot of evil that's in the land and we need to go to God in prayer. And I believe that he would hear and answer each and every one [26] of our prayers.

All wise and all merciful God, our Dear Heavenly Father. Father God, we come right now to thank you first of all for your grace, we thank you for your mercy, we thank you for the love that you continue to shower down upon each and every one of us. We have gathered

here in this chamber tonight to address the business and the concerns of this great city that we live in, but we ask, Lord, that you would look upon us and that you would bless us individually and collectively, that each and every household is represented and that's out there in TV land, whatever needs there are that they have, we ask that you would meet those needs right now. We pray for healing upon the sick and afflicted in the land, for bereaved families as our minds focus on the Garnett family, as they have buried a loved one today. We pray that you would continue to be with them and lift them up. And not only them, but others in the community. Families that are enduring a time of bereavement and sorrow, that you would be with them and give them the strength [27] that they need. As our nation is in war and there is rumors of other conflicts flaring up, but you know all about that because in your word you said that there would be a time when there would be wars and rumors of wars, and we are living in perilous times, which are known as very dangerous times because if we turn on our TV sets or we pick up the paper, turn on the radio, we hear so much that is going on. But I realize that you are still in charge, so we ask that you would address those concerns and those needs that we have. Forgive us all for our sins, lead, guide and direct us is our prayer in Jesus' name. Amen.

Appendix

May 13, 2003

MAYOR BECK: Thank you very much. I would like to call the May 13, 2003, meeting of the Fredericksburg City Council to order. Thank you. We will start with a prayer led by councilman Matt Kelly, followed by the Pledge of Allegiance.

MATTHEW J. KELLY: Most merciful Father, be with us here tonight to comfort those in need,

* * *

[9] * * *

encourage us to share the blessings we receive with those less fortunate than ourselves. All of this we ask with praise and thanksgiving for this opportunity to serve. Amen.

August 13, 2002

HASHMEL C. TURNER, JR.: All wise and all merciful God, Our Dear Heavenly Father, we gather Lord God in this hour of the evening and we realize, Father, that you are in our presence. We thank you for your grace, thank you for your mercy. Lord we just thank you for all the love that you continue to shower down upon us. As we are about the business of this locality, we ask Lord God, that you will cleanse our hearts and our minds that we make the right decisions that's best suited for this locality and we ask that you would

bless our leaders from the state wide offices and for the national offices and the world wide leaders. We are in some turbulent times. There is war and rumors of war is going on around us. We are much concerned, Lord God, and we realize that it's all in your care. We ask that you would [10] be with us through this session, that we would do those things that are pleasing in your sight. Thank you for what you have done in our lives. Lord, we thank you for what you are going to do in Jesus' holy name we pray. Amen.

August 27, 2002

MAYOR BECK: Good evening, I would like to call the August 27, 2002, meeting of the Fredericksburg City Council to order. We will start with a prayer led by Councilman Thomas Fortune followed by the Pledge of Allegiance.

THOMAS FORTUNE: We ask God to give this counsel the energy to look at all sides of the issues that come before it. We ask that we be given the integrity to decide matters on the basis of what's best for all the people of the city and not on the basis of what might be good for us personally. And we ask for the patience to listen to public criticism with humility when we are in the wrong, and with forbearance when that criticism is petty, foolish or mean spirited. Amen.

* * *

[33] * * *

city's business tonight, help us make decisions that benefit all the residents of Fredericksburg, in your name we pray. Amen.

July 22, 2000

HASHMEL C. TURNER, JR.: —we are concerned about those that are less fortunate, we pray that you will continue to bless families that are going through a period of bereavement. Please be with them right now and give them guidance and help them through their time of sorrow. We are concerned about our men and our women around the world that are serving in our Armed Forces. We ask that you will continue to bless and protect them, keep them ever before you, and we ask, Lord God, that you would help us to always be mindful that we are about doing those things that are pleasing in your sight. Continue to give us guidance and direction as we address the concerns of this city tonight, for we thank you for what you have done. Lord, we thank you for what you are doing right now. And in the name of Jesus Christ, we thank you for what you are going to do. [34] Amen.

August 12, 2003

MAYOR BECK: Thank you, I would like to call the August 12, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by Vice Mayor Scott Howson, followed by the Pledge of Allegiance.

W. SCOTT HOWSON, III: Heavenly Father, we thank you for this opportunity to serve. And humbly ask your blessing on those gathered here tonight. Guide us through inevitable conflicts. Help us to keep our minds on the job before us. Instill in us the confidence to pursue the best solutions, and the wisdom to know when we have reached that point. Keep our eyes and ears ever focused on the needs of the individuals and families who very selected us for this task, and who trust us with this responsibility. And as we work together, we are thankful for the strength, dedication and knowledge of the men and women who comprise the city staff, without who's efforts our work would mean nothing.

* * *

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especially those still suffering from the effects of Hurricane Isabel. As always, we also ask that you be with our men and women in uniform, both in the Armed Forces, as well as law enforcement and emergency services. Their sacrifices and those of their families insure the safety and freedom that we enjoy. Let us not forget that we are here to serve and not be served. And as we conduct the city's business tonight, help us make decisions that benefit all the residents of Fredericksburg. In your name we pray. Amen.

October 14, 2003

MAYOR BECK: Thank you all for being here. I would like to call the October 14, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by councilman Hashmel Turner, followed by the Pledge of Allegiance.

HASHMEL C. TURNER, JR.: Heads bowed, eyes closed. The hymnologist one day picked up a pen and he put these words to penmanship. "Must Jesus bear the cross alone and all the world go [39] free. No, there is a cross for everyone, surely there is one for me."

All wise and all merciful God, out there, Heavenly Father, we come at this hour today to say thank you for grace, thank you for mercy. Lord we thank you for all the love that you continue to shower down upon each and every one of us. Lord we are concerned about the things of the city, and we are here this evening to address the business of this dear city. We are concerned, Lord God, about our families. We pray your blessings upon them, family members far and near. We ask your blessings upon them from the oldest to the youngest. We realize, Lord God, that our nation is going through some terrible times. We turn on the TV, we turn on the radio, we pick up the newspaper, we hear war and rumors of war. We ask, Lord God, that you would bless our service personnel world wide as they defend the freedom that we cherish so dearly. We are just so thankful now for another opportunity to stand before you and to acknowledge that you are the God, the

creator of heaven and earth. We pray [40] Lord God, that you would just look at our hearts and our minds, search them. If you find anything there that shouldn't be, we pray Lord God, that you would remove it. We pray Lord God, that you would continue to instill in our leaders, starting with the local, the state, the national, and the world wide leaders, that they may seek peace, that they have an understanding heart to be concerned about the creation, your prized creation, mankind. Lord, we ask these blessings in Jesus' name. Amen.

October 28, 2003

MAYOR BECK: Thank you very much. I would like to call the October 28, 2003, meeting of the Fredericksburg City Council to order. We will start with a prayer led by councilman Vice Mayor Scott Howson, followed by the Pledge of Allegiance.

W. SCOTT HOWSON, III: Heavenly Father, we come here tonight thankful for the privilege of serving our citizens of the city. Grant us patience and wisdom as we work together to find

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No. 08-518

Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

HASHMEL C. TURNER, JR.,

Petitioner,

v.

THE CITY COUNCIL OF THE CITY OF FREDERICKSBURG, VIRGINIA; THOMAS J. TOMZAK, in his official capacity as Mayor of the City of Fredericksburg, Virginia,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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ARGUMENT

Contrary to the brief filed by the City Council, it is hardly well-established that legislative prayer is government speech. Turner's arguments are not "preposterous." Instead, this case presents important issues under the Free Speech Clause (involving Councilor Turner's right to be free from viewpoint discrimination) and the Establishment Clause (arising from the City's prescribing nondenominational prayer and proscribing the use of the name of Jesus Christ, despite the lack of any finding that Turner's prayers ever "exploited the prayer opportunity" to proselytize or advance any one particular religion at the expense of another).

1. The Government Speech Doctrine is Not Well-Established.

The City Council is right about one thing – other courts certainly have analyzed legislative prayer under the Establishment Clause. And they have done so precisely because plaintiffs have sued state actors claiming the prayers violate the Establishment Clause. Yet the posture of those other cases – which did not involve a city councilor seeking to protect his own right to free speech in the face of blatant viewpoint discrimination – does not lead inexorably to the conclusion that legislative prayer is government speech. Nor do those other cases confirm that the government speech doctrine is so well-established that its application to this case was, as the City Council argues, a foregone conclusion.

Indeed, this Court's precedent applying the government speech doctrine establishes that legislative prayer *cannot* be government speech because such a conclusion, in effect, would authorize government to dictate every word of a legislative prayer. See, e.g., Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005). Regardless of one's view about whether Lee v. Weisman, 505 U.S. 577 (1992), applies in the legislative prayer context (it does), at the very least this Court's Establishment Clause jurisprudence establishes that the City Council would violate the Establishment Clause if it dictated the precise content – each and every word – of a legislative prayer. Unfortunately, this result is exactly what the Fourth Circuit's reasoning and the City Council's brief both contemplate and permit.

Because the City Council cannot dictate the precise content of prayer, it follows that private speakers – in this case Turner and other councilors – retain control over the content of their personally-formulated speech. The element of control is key. In fact, it is perhaps the key element in the government speech analysis. See Johanns, 544 U.S. at 560-61 (discussing government control of speech at issue).

While the City Council (and the Fourth Circuit) point to some indicia that it believes confirm such prayers as government speech – for example, that the prayer is listed on the official meeting agenda – the existence of such elements does not erase the critical role of the private speaker. This Court itself recently has considered that some speech may include elements of *both* private speech and government speech – what one might call

"hybrid speech," or "mixed speech." See, e.g., Tr. of Nov. 12, 2008, Oral Argument in Pleasant Grove City, Utah et al. v. Summum, Docket No. 07-665, pp. 10, et seq. (Attached as App. A-1). In such cases, the government should not be permitted to discriminate between and among religious viewpoints, which the City Council did when it censored Turner's personal speech. See Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004) (holding that viewpoint discrimination would be impermissible in hybrid speech cases).

In sum, the Court should grant the petition to settle the government speech issue, to consider the important private speech interests that are inherent in the context of individually-expressed legislative prayer and to confirm that individual expression remains protected from unlawful discrimination when non-proselytizing religious viewpoints are expressed in those prayers.

2. *Pelphrey* Is Relevant.

There is no question that the City Council is right on one other issue, namely that the decision in Pelphrey v. Cobb County, Ga., No. 07-13611 (11th Cir. Oct. 28, 2008), involved taxpayers who sued state actors for alleged violations of the Establishment Clause – and not a city councilor who sought relief from violations of his individual free speech rights and violations of the Establishment Clause. As discussed in Turner's supplemental brief, however, Pelphrey matters for two reasons: 1) The Eleventh Circuit has created a circuit split in addressing legislative prayer, because, in stark

contrast to the Fourth Circuit's holding in this case, the Eleventh Circuit acknowledged that the decision in Lee v. Weisman, and specifically that portion of Lee holding that it is no business of government to compose official prayers, *applies* in the legislative prayer context; and 2) The Eleventh Circuit recognized, in effect, that a policy attempting to differentiate between "sectarian" and "nonsectarian" prayer – or, in this case, "denominational" and "nondenominational" prayer – is a futile (and unconstitutional) task. On these two issues, the fact that the legal posture of the plaintiffs was different is not material, but the conflicting constitutional rationales are and require reconciliation between the federal circuits of the governing principles of law.

3. The Establishment Clause Issues Are Joined.

The City Council also downplays the Establishment Clause issues in this case, arguing that the Fourth Circuit never addressed whether sectarian prayers violate the Establishment Clause. (Br. in Opp., p. 15). This argument misses the point. Turner's Complaint, and his argument before the district court and the Fourth Circuit, was that the City Council could not *prescribe* nondenominational prayer and *proscribe* the use of the name of Jesus Christ without running afoul of the Establishment Clause. The Fourth Circuit's ruling that such a policy is constitutionally acceptable, in effect, puts at

risk the diversity of religious viewpoints in this country.[1]

The City Council's response to this argument is that since Marsh v. Chambers, 463 U.S. 783 (1983), prohibits exploitation of the prayer opportunity to proselytize or advance one religion, a city council is afforded broad latitude to adopt policies that act as a prophylactic against such unconstitutional outcomes. This argument, however, flips Marsh on its head and also ignores not only the unique circumstances in which the prayer was offered in this case, but the utter lack of any factual findings that the prayer opportunity had ever been exploited in this case (because it had not). Marsh says that the government cannot parse the content of a specific prayer unless there *first* has been a finding that the prayer opportunity was exploited to proselytize or to advance one particular faith over another.

Equally important, the City Council policy impermissibly entangles government in the nuances of religious doctrine and belief. The City Council must exercise its own standardless discretion to decide what is, and what is not, "nondenominational" prayer. Government officials

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[1] It also ignores the reality of the broad impact of the Fourth Circuit's decision. As noted in Turner's Petition, the Virginia State Police is now prohibiting chaplains from using denominational references in their prayers, a policy change that caused at least five chaplains to resign. See "Virginia Police Chaplains Quit Over New Prayer Policy," The Washington Times, Sept. 26, 2008; "State Police Chaplains Resign Over Prayer Restrictions," Richmond Times-Dispatch, Sept. 24, 2008 (Attached as Appendix B-1).

are plainly incompetent to make such judgment calls. The principles announced in Marsh and Lee v. Weisman recognized the danger of such parsing and prescription, but the City Council and the Fourth Circuit have abandoned those principles, effectively establishing a civic religion that this Court in Lee v. Weisman expressly rejected: "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted." 505 U.S. at 590.

In sum, the City Council violated the Establishment Clause when it prescribed nondenominational prayer and proscribed use of the name of Jesus Christ. Its action is not authorized by Marsh v. Chambers, is expressly prohibited by Lee v. Weisman, and this Court should grant review to rectify the Fourth Circuit's error.

CONCLUSION

For these reasons and those set forth in Turner's original petition and supplemental brief, the Court should grant review and reverse the Fourth Circuit's decision below.

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[2] __ U. S. ___.

Respectfully submitted,

/s/

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December 5, 2008

APPENDIX

JUSTICE SOUTER: Mr. Sekulow, can I just ask: At what point in the litigation did you first raise the Government speech argument?

MR. SEKULOW: At the Tenth Circuit. The Tenth Circuit, the existing law in the Tenth Circuit in the Summum line of cases mandated a private speech determination, even if the speech was controlled or known by the Government, if it originated with a third party. As soon as we were before -- and under Tenth Circuit rules that's binding, of course, on the district court and on the panel.

But even in the panel brief, we raise the issue of Government speech and the Court addressed it both as to -- and, Justice Kennedy, going back to your point -- both as to Government speech and to the speech selection cases of Forbes, Finley, and American Library Association. And I think that those cases as well point to what's at issue here. Governments in the business of governing and determining the parks and the landscape of the parks make these kind of decisions.

JUSTICE SOUTER: Isn't the tough -- isn't the tough issue here not so much whether there is Government speech. I will assume and I do indeed assume that there is. Isn't the tough issue here the claim that there is -- is in fact a mixture, that it is both Government and private. And the argument for its continuing to be private speech I take it is simply the Eagles identification with the presentation and

their espousal of what the monument says. How -- how do you think we ought to deal with the mixture issue.

MR. SEKULOW: Well, I think the fact that it originated, that the monument originated by the Eagles as a third party, doesn't in any way take away from the fact that in this particular case, and in most cases involving donated monuments, which, as the United States would point to, most of the monuments in parks are donated by or originated with third parties –

JUSTICE SOUTER: They probably are, but most of them -- and you correct me if I'm wrong here. But I don't suppose that most of them -- most of them contain as part of -- in a prominent place in the monument itself contain the statement that, you know, this is the gift of or the position of or what-not of X, Y or Z, whereas this monument does.

MR. SEKULOW: Most of them, Justice Souter, do actually have statements. In fact, a perfect example would be at Gettysburg National Military Park a number of those monuments, most of them, are donated by or originated by third parties. They'll often say "Donated by," for instance, "the Father Corby –

JUSTICE SOUTER: We may have more cases coming.

MR. SEKULOW: I hope not.

JUSTICE SOUTER: But tell me, what is the criterion that we should use to decide what the significance of the private identification is?

MR. SEKULOW: I think the key should be, as this Court alluded to in Johanns, the issue of control, who controls the message ultimately here. And the fact is the Statue of Liberty originated by the Franco-American Union -- was originated by a third party. The United States by resolution accepted it. At that point title transfer.

JUSTICE GINSBURG: If that -- if we accept that there is Government speech, I think Justice Souter's question is isn't this really the Government endorsement of the Eagles' message? I mean, the Eagles are all over this monument, their symbol of the eagle, and the Eagles want it to be known that this is their monument. Indeed, I think in Van Orden wasn't the -- in the district court there, wasn't the statement, well, this -- Texas did this in recognition of the good work that the Eagles do in preventing -- - help try to prevent juvenile delinquency.

MR. SEKULOW: Right. And I think that actually points to why that once it's controlled and owned by the Government the fact that it originated in the third party, Justice Ginsburg, changes the equation for ownership and control to the Government.

JUSTICE SOUTER: Well, if it does, it changes it, as I understand your answer, by

eliminating the private aspect of the speech. So that your real answer to me is it's not a mixture.

MR. SEKULOW: It's not.

JUSTICE SOUTER: And there ceases to be a mixture the moment the Government accepts it.

MR. SEKULOW: Once -- right, title, and interest vest under Utah law in the Pleasant Grove City upon acceptance and at that point it is owned and controlled by the city. And the fact that it was originally created -- and Justice Ginsburg, you're correct, the district court and also the court of appeals in Van Orden stated that it was originated as a moral guidance for youth. That was the reason that the Fraternal Order of Eagles developed. The State of Texas said: We're going to honor the Eagles. That was their reason, as well as showing the role of the Ten Commandments and the rule of law. And then the Third-excuse me, Justice Stevens.

JUSTICE STEVENS: Can I ask you question

Virginia Police Chaplains Quit Over New Prayer Policy

GARY EMERLING
The Washington Times

LexisNexis

At least six of the Virginia State Police's 17 chaplains have resigned following a request they offer only "nondenominational" prayers during department-sanctioned public events and ceremonies, police said Wednesday.

The request was made by state police Superintendent Col. W. Steven Flaherty earlier this month and has been decried by Virginia House Republicans as a violation of the First Amendment and an attack on Christianity. One Republican delegate said chaplains were told they could not invoke the name of Jesus, but a state police spokeswoman denied the assertion.

To "require those troopers to disregard their own faith while serving violates their First Amendment rights and prevents them from serving effectively as chaplains," said House Majority Leader H. Morgan Griffith, Salem Republican. "These men had little choice but to resign."

Col. Flaherty asked the chaplains to offer only nondenominational prayers at public events, such as trooper graduations and annual memorial services. He said he was acting in response to a recent 4th Circuit Court of Appeals decision that dealt with

sectarian prayers offered at meetings of the Fredericksburg City Council.

He said chaplains whose beliefs conflict with the request could opt out of participating in such events. Col. Flaherty also said chaplains officiating at funeral ceremonies or counseling individual employees and their families were not bound by the request.

State police chaplains are sworn department personnel who are on duty and paid while performing in that capacity.

"This is not a forced situation," state police spokeswoman Corinne Geller said. "For those who are uncomfortable with that, we wouldn't put them in that position."

However, Delegate Charles W. "Bill" Carrico Sr., a former state trooper, said he has spoken with some of the chaplains, who said the colonel's request was not put in writing and was treated as an order.
The chaplains were told that "they cannot reference the name of Jesus Christ," said Mr. Carrico, Grayson Republican. "That's against their beliefs and against the dictates of their conscience."

But Ms. Geller, who was not at the meeting, insisted that Col. Flaherty "never once came out and said you cannot invoke the name of Jesus Christ or anything."

The issue of whether chaplains can pray in Jesus' name is not new.

In late 2005, Navy Lt. Gordon Klingenschmitt, an evangelical Protestant chaplain, staged a hunger strike in front of the White House to protest the Navy's policies of encouraging generic, nonsectarian prayers in public settings in place of petitions in the name of Jesus.

He was later court-martialed for appearing in uniform at what the Navy deemed a political protest and eventually discharged.

The controversy spurred several branches of the military to revise their guidelines on what chaplains can and cannot do. The Air Force, for instance, said it would not require its chaplains to offer nonsectarian prayers.

Ms. Geller said the colonel did not consult with Gov. Tim Kaine, Democrat, before issuing the request. She said the decision was "an internal matter" and "exclusively that of Colonel Flaherty."

Kaine spokesman Gordon Hickey also said the governor was not involved in the decision, but thinks it's "a reasonable action" because it allows denominational services for private events such as funerals.

"The governor has every confidence that Colonel Flaherty will direct the chaplains and all state troopers to adhere to the law," Mr. Hickey said.
He also criticized Mr. Griffith for what he termed a "political attack" on the faith of Mr. Kaine, a Catholic.

Mr. Griffith on Wednesday blamed the Kaine administration for "prohibiting the troopers from referencing Jesus Christ in public prayers."

"The last time I checked, the Catholic Church was in favor of Jesus Christ," he said.

Mr. Carrico and Mr. Griffith have pledged to work to reverse Col. Flaherty's decision. Mr. Carrico said he plans this week to begin an online petition and Web site, www.injesusnameipray.com.

Both lawmakers also said they are prepared to introduce legislation to reverse the decision when the General Assembly convenes in January.

"If the problem resolves itself, you might need to do protective legislation for the future," Mr. Griffith said. "We'll have to see how it plays out."

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RICHMOND
TIMES DISPATCH

State police chaplains resign over prayer restrictions

By STAFF REPORTS

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At least five members of the Virginia State Police chaplains program have resigned after being told they must abstain from praying in the name of Jesus Christ during department-sanctioned events involving the public.

Concerned about offending people of other faiths, state police Superintendent W. Steven Flaherty recently directed the agency's 17 chaplains to begin delivering neutral or non-denominational prayers at events such as trooper graduation ceremonies and its annual memorial service for fallen officers.

"The department recognizes the importance of a state government agency to be inclusive and respectful of the varied ethnicities, cultures and beliefs of our employees, their families and citizens at-large," Flaherty said in prepared statement to the Times-Dispatch.

The decision has offended nearly a third of the department's 29-year-old chaplaincy corp – all sworn officers – who have quit their ministerial posts in protest.

Their cause has been taken up by Del. Charles W. Carrico Sr., R-Grayson, who has contacted the Virginia Attorney General's Office for counsel and is launching a Web site – InJesusNameIPray.com – in a push to have the decision overturned.

"You don't check your religious beliefs at the door just because you're hired by the state and are a member of the department," said Carrico, a former state trooper, in a telephone interview.

"As must as I love the department,...this is a sad moment for me," he added.

Carrico believes the decision goes beyond a constitutional separation of Church and State.

"It a separation of Jesus and state, which offends me greatly," he said. "What we have here is an attack on the name of Jesus, on the name of Christ. And I'm not going to sit back and just let it happen."

Carrico said he intends on introducing legislation that would address the issue.

"In his statement, Flaherty said the decision is based on a recent ruling by the 4th Circuit Court of Appeals in Richmond, which upheld a Fredericksburg City Council ban on sectarian prayer. Council member Hashmel C. Turner Jr. sued the body in 2006 over its policy prohibiting references to specific religions in prayers used to formally open council meetings.

--Mark Bowes